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Agency—*Misrepresentation—Principals' liability—Action "for money had and received."*

An agent's misrepresentation does not estop the principal unless it was within the scope of the agent's authority to make such representation.

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Where a person, who was entitled to certain periodical payments from the Government, did not register his name in the Collector's register and another who was a *bona-fide* purchaser for value from the previous owner, so entered his name and was in receipt of those payments:

Held, that the real owner could not maintain against the latter a suit for the arrears as "for money had and received."

Ramaswami Aiyar v. Kanthayyan 57

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Bequest:—*See* WILL.

Burden of proof:—*See* HINDU LAW (8).

1. **Cause of action.**—*Harbour Trust Board—Extension of the Harbour —Injury to plaintiff's land—Action for damages.*

Where the harbour constructed by the Madras Government and handed over to a Trust Board under Act II of 1886, was subsequently extended by the Board under the powers given to them by the Act and the plaintiff brought a suit to recover damages for injury caused to him by the encroachment of the sea on the ground that the Board was bound to, but did not, maintain and keep in good repair a revetment or sea-wall so as to protect the plaintiff's property from harm:

Held, affirming the judgment of *Shephard*, J., that the plaintiff had not shown any valid cause of action against the Board.

Per Subrahmania Aiyar, J. :—The erection of the harbour wall was not *per se* a nuisance. The Government and the Board had but used their property, *viz.*, the foreshore, in a natural manner and without any negligence and were not liable to the plaintiff for the damage done to him. It may be they could have prevented the injury by maintaining a revetment, but they were under no legal duty to do so. Even if there was a duty to maintain a revetment, the statute gave them no power to spend any money on constructions not required for the purposes of the harbour; the Act, therefore, conferred upon them the right to maintain and improve the harbour, notwithstanding that it might be a nuisance and cause loss to other persons.

Per O'Farrell, J.:—The user of the foreshore for the construction of a harbour could not be said to be a natural user of it within the meaning of the decided cases. As held by *Blackburn*, J., in *Geddis* v. *Bann Reservoir Proprietors*, 3 A. C., 430, no action lay to recover damages caused by the exercise of statutory powers without negligence, but statutory powers could not be

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said to be exercised without negligence, if, by the exercise of powers given by the statute or common law, the damages could have been averted. If the Board by *reasonable* expense in maintaining a revetment, could have prevented the injury to the plaintiff, they were bound to do so. And if they were so bound, it could not be said that the right, given to the Trustees of spending money, "for the purposes of the Act" did not include the maintenance of a revetment to protect others from harm.

Hajee Ismail Sait v. *The Trustees of the Harbour of Madras* ... 270

2.———————— :—*See* MORTGAGE.

Champerty, law of :—*See* TRANSFER OF PROPERTY ACT (1).

Charter Act, S. 15 :—*See* JURISDICTION (1).

Civil Courts Act, S. 13 :—*Practice—Appeal part heard by the District Judge—Transfer to the Court of Subordinate Judge—Continuation of the hearing—Civil Procedure Code, S. 25.*

When an appeal part heard by the District Judge was transferred to the Subordinate Judge and he continued the hearing and disposed of the appeal.

Held, that the procedure was irregular and that the appeal should be re-heard.

Kotaiya v. *Lakshmaiya* 297

1. **Civil Procedure Code, Ss. 2, 244, 412, 540, 622**.—*Suit by minor in forma pauperis—Order directing next friend to pay court-fees—Collector's application to execute dismissed—Appeal—Revision.*

Where on the dismissal of a suit by a minor in *forma pauperis*, the next friend was directed by the decree of the Court to pay the court-fees due to the Government and the application of the Collector to execute the decree against the estate of the next friend was dismissed on the ground that on his death his estate had passed to his son by survivorship unaffected by the decree.

Held, on appeal by the Collector, that he was not a party to the suit and could not avail himself of the provisions of Ss 2, 244 and 540, and that, therefore, no appeal lay against an order disallowing his application to execute the decree.

Held, that the next friend of the minor could not (at least in respect of an order under S. 412) be considered to be a party to the suit within the meaning of S 244 and that on this ground also the order was not appealable.

Held, also, that as no question of jurisdiction was involved, the court could not exercise its powers of revision under S. 622 of the Code of Civil Procedure.

Collector of Trichinopoly v. *Sivaramakrishna Sastriar* 265

2.———————————**Ss. 2, 523**—*Refusal to refer to arbitration—Decree.*

An order under S. 523 refusing to refer a matter to arbitration is a decree within the meaning of S. 2, Civil Procedure Code.

Dayanand v. *Bakhtawar Singh,* I. L. R., 5 A., 333, dissented from.

R. Ry. Manavikrama v. *Mallichery Krishnan Nambudri,* I. L. R., 3 M., 68, commented on.

Magata v. *Bagavan* 10

2a ——————————**S. 11** :—*See* RELIGIOUS OFFICE.

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3. ———————, **S. 13**—*Issue res judicata—Estoppel by conduct—Indian Limitation Act, Art.* 118—*Affiliation of females—Possession by a tarwad member—Adverse possession—Affiliation to branch of tarwad—Local usage.*

A suit for a mere declaration of title in so far as it relates to lands not in the possession of the plaintiff is unsustainable.

Where an issue had been decided in a previous suit between the same parties in reference to a portion of the subject-matter of this suit:—

Held, that the issue was not *res judicata* except as to the portion actually affected by the decision in that suit, as the tribunal which decided that case was not of jurisdiction competent to try the subsequent suit.

Where the members of one branch were affiliated to and living with another branch of the tarwad and had been recognised by the members of the whole tarwad as belonging to that branch:—

Held, that the members of the tarwad were not estopped by their recognition from contending that the affiliated members had no right to the property of that branch, as the affiliated members had in no way acted to their detriment.

Art. 118 of the 2nd Schedule to the Limitation Act relates only to the case of the adoption of a son under the Hindu Law, but does not apply to affiliation of females under the Malabar Law or according to local usage as in the case of dancing-girls.

Where the Karnavan is in possession of property on behalf of a Thavali, the constructive possession which every member may be said to have of the properties cannot support a claim by adverse possession.

There may be valid affiliations to a tarwad; but an affiliation to a branch of a tarwad not only severed from it cannot be made unless there is any local usage to suppoit it.

Valiappan Nair v. *Para Nethiar* 196

4. ———————**S. 13.**—*Res judicata—Ex parte decree, finality—of.*

An *ex parte* decision is not final within the meaning, of S. 13 of the Code of Civil Procedure and cannot act as *res judicata.*

Nilmoney Singh v. *Heera Lall Dass* I. L. R., 7 C., 23, and *Bhugirath Patoni* v. *Lochun Deb,* I. L. R., 8 C., 275, approved and followed.

Sellathammal v. *Oliver* 60

5. ———————, **S. 25.**—*See* Civil Courts Act.

5a. ———————, **Ss. 30, 375.**—*Compromise—Decree, finality of—Revision petition—Conversion into appeal—Right of one of several plaintiffs to challenge compromise.*

In the course of an appeal pending before the District Judge, a petition, No. 59, was put in by the vakils of plaintiffs and defendants 3 and 4 requesting the Court to dismiss the appeal on the ground of an alleged compromise between the parties. On the other hand another petition, No. 96, was filed by the 1st plaintiff and the 4th defendant denying that any compromise was ever made and asking the Court to proceed with the appeal. The Judge passed a final order on the petition, No. 59, and another on both the petitions jointly in the nature of a judgment on the whole matter; but no order was passed on the other petition, No. 96. This revision petition was then put in

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purporting to be against an order on petition No. 96, dated June 27, 1898. The order of that date was really on petition No. 59:

Held, that the revision petition might be treated as having been instituted against the order on C. M. P. 59; that an appeal lay against the dismissal of an appeal on the ground of adjustment out of Court where the parties denied that any adjustment was made or that the vakils had any authority to make the compromise; that in the circumstances of the case the revision petition having been filed within the time limited for an appeal might be treated as such on payment of the proper court-fees; that the fact that the plaintiffs sued on behalf of a Sabha with the permission of the Court, under S. 30, Civil Procedure Code, did not deprive one of them of the right to challenge an alleged compromise to which one of many plaintiffs would ordinarily be entitled; and that the lower Court before dismissing the appeal should have taken evidence and satisfied itself that the compromise was assented to by the parties.

Goculdas Balabdas Manufacturing Company v. *Scott*, I. L. R., 16 B., 202, and *Mahomed Wahibuddin* v. *Hakiman*, I. L. R., 25 C., 757, followed.

M. Sreedharan Somayajipad v. *Paramatham Somayajipad* ... 350

6. ——————, **S. 211.**—*See* Limitation Act (5).

7. ——————, **S. 211.**—*Construction of decree - Reasonable construction.*

Where a decree for redemption of a kanom directed the recovery of property on payment of the kanom amount minus the purapad sued for, and the purapad accruing due thereafter:

Held, that though the terms of the decree were indefinite, having regard to the provisions of S. 211, C. P. C., the decree should be taken to have given nothing more than the rent due until the delivery of the property or the expiration of three years from the date of the decree, whichever event first occurred.

Krishnan v. *Kunhi Moidin Kutti* 334

8. ——————, **S. 230**—*Execution—'Fraud' meaning of—Limitation.*

Locking up the outer door of a house and so evading execution of a decree is "fraud" within the meaning of the term in S. 230, Civil Procedure Code, and the period of 12 years provided by that section for execution of decrees will run afresh from the date of such fraud. *Annamalai* v. *Rangasami*, I. L. R., 9 M., 365, and *Bhagu Jetha* v. *Bawasaheb*, I. L. R., 9 B., 318, relied on.

Venkiah v. *Ragavacharlu* 28

9. ——————, **S. 244.**—*Transfer of Property Act, S. 99—Money decree in favour of a mortgagee—Execution of decree—Sale of mortgaged properties, validity of—Suit by judgment-debtor to cancel the sale.*

[*Obiter:* In spite of sale and purchase in execution of a money decree by the mortgagee the mortgagors may sue to redeem the mortgaged properties on payment of the mortgage-money and so much of the money due under the money-decree as was satisfied by the sale. *Martand* v. *Dhondo*, I. L. R., 22 B., 624, referred to, and approved.]

The parties to an execution proceeding can raise the question of the validity of a court-sale only in proceedings instituted under S. 244, C. P. C., and not in a separate suit.

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But if the suit is instituted in the very court in which execution proceedings should be taken, the court may treat the plaint as an application under S. 244, C. P. C., and give relief accordingly. *Biru Mahata* v. *Shyama Churn*, I. L. R., 22 C., 483, approved.

When once the sale has been confirmed by the Court, and has become final, the sale cannot be set aside at the instance of the judgment-debtor. *Durgayya* v. *Anantha*, I. L. R., 14 M., 74, referred to.

A sale in contravention of the provisions of S. 99 of the Transfer Property Act is not void but only voidable as against those who have a right to redeem.

Mayan Pathoothy v. *Pakuran*... 98

10. ——————, **Ss. 244, 266, cl.** (l)—*Annuity to a man and his heirs—Maintenance—Attachment—Transfer of Property Act, S. 99—Mortgage of annuity charged—Suit upon mortgage—Money-decree—Sale in execution.*

An annuity to a man *and his heirs*, though expressed to be payable for maintenance, does not fall within the terms of clause (*l*), S. 266 of the Code of Civil Procedure, and may be attached and put up for sale in execution of a money-decree.

A sale of mortgaged properties by the mortgagee in execution of a money-decree is contrary to the provisions of S. 99 of the Transfer of Property Act, and does not interfere with the right of redemption possessed by persons not parties to the suit; and this, although the money-decree was passed in a suit upon the mortgage in which a decree for sale might properly have been made.

A son in a Mitakshara family is not bound by a sale in defiance of S. 99, Transfer of Property Act [although he would be bound by a sale in execution of a proper mortgage-decree against the the father].

Persons who were not parties to the money-decree, in execution of which the mortgaged properties were brought to sale, need not and cannot institute proceedings under S. 244 of Civil Procedure Code in order to question the sale but may file a regular suit for redemption of their share of the mortgaged preperty.

Muthuraman Chettiar v. *Sundra Kumura Ettappa Sami* 113

11. ——————, **S. 285.**—*Attachment by a superior and an inferior court—Jurisdiction of inferior court—Irregularity of sale—Sale by whom questionable.*

Where a property is attached both by an inferior and a superior court, S. 285, Civil Procedure Code, does not take away the jurisdiction of the inferior court to deal with the property. Any proceeding by the inferior court in contravention of that section would be an irregularity which would vitiate such proceedings *only if* there were notice of proceedings in the superior court. Further, the proceedings in the inferior court can be questioned only by the parties to the two proceedings and not by strangers.

Ram Narain Singh v. *Mina Koery*, I. L. R., 25 C., 46; *Abdul Karim* v. *Thakordas Tribhovandas*, *Ib.* 22 B., 88, followed; *Muthukaruppan* v. *Muthuramalinga*, *Ib.* 7 M., 47, distinguished.

Atiyandiyil v. *Lakshmi Amma* 1

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12. ———————, S. 317.—*Execution purchaser—Purchase in stranger's name—Suit by a coparcener of the execution purchacer.*

Under S. 317, C. P. C., it is not competent to a person to maintain a suit against a certified purchaser on the ground that the purchase was made on his behalf or on behalf of any other person *through* whom he claims. But it is open to the coparcener of the real purchaser (who does not claim through him) to prove that the purchase made in the name of the certified purchaser was really made on behalf of the family to which he belongs and maintain a suit for the recovery of what, on that footing, may belong to him.

Bhod Singh Doodhoonia v. *Gunesh Chunder Sen*, 19 W. R., 356; *Natesa* v. *Venkataramaiyah*, I. L. R., 6 M., 135, and *Meenakshi Ammal* v. *Kalliana Ramaiyan*, I. L. R., 20 M., 349, followed, and *Ramakurup* v. *Sridevi*, I. L. R., 16 M., 290, referred to.

Krishna Aiyan v. *Raghavaiyan* 298

13. ———————, S. 335:—*See* LIMITATION ACT (2).

14. ———————, S. 335.—*Summary order as to title—Regular suit—Art.* 11 *of the Limitation Act—Construction of order.*

Where a court has expressed no opinion as to the question of title raised by a claimant under S. 335 of the Civil Procedure Code, a regular suit by the claimant to establish title is not governed by Art. 11 of the Limitation Act and is not barred, if not brought within one year from the date of the order.

Where the executing court in investigating a claim under S. 335, C. P. C., did not take any evidence, but only referred to the decision in a case of criminal trespass and an order on a claim petition presented by a predecessor in title of the plaintiff, and without saying that on the strength of the two documents it formed a definite opinion as to the respective claims of the parties concerned wound up the order with the words "Under these circumstances, I think it is useless to hold a summary inquiry as to the present possession of the land":

Held, that the reasonable construction of the order was that the court for some reason or other declined to deliver a decision on the claim submitted for its consideration.

Alwar Iyengar v. *Zellevegar* 175

15. ———————, Ss. 365 and 366.—*Death of appellant—Two out of four representatives substituted for appellant—The other two made respondent after time—Abatement—Limitation Act, Art.* 175-*A—Hindu Law—Mortgage by widow—Suit after her death—Money advanced to discharge prior debt of widow—Binding character of debt—Inquiries.*

All the legal representatives of a deceased appellant should, if possible, join in the application to the court to be made parties in place of the deceased. But if, by reason of the ignorance of the existence of other representatives or of the unwillingness of some of them to join in the application or of the *bonâ fide* belief, on the part of some, of exclusive title, or for any other like cause they are not able to join, those who agree may apply, within the period limited by Art. 175-A of the Limitation Act, to be made parties so as to save the proceedings from abatement under S. 366, C. P. C.

Bhikaji Ramachendra v. *Purshotam*, I. L. R., 10 B., 220, and *Ghamandi Lal* v. *Amir Begam*, I. L. R., 16 A., 211, considered.

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In a suit brought after the death of a widow for the recovery of money due upon a mortgage executed by her for the purpose of discharging a debt created by herself:

Held, that the lender was bound to make some inquiries as to the origin and character of the debt, for the discharge of which he was advancing money, and that if such inquiries would have shown that there was no debt, or at all events no such debt as would bind a reversioner, the creditor could not recover the money from the persons on whom the property has devolved.

Musalareddi v. *Ramayya* 313

16.——————, **S. 444.**—*Minor—Guardian* ad litem—*Execution—Order against minor without guardian, invalidity of—Application by minor—Practice.*

An order for execution passed against a minor without a guardian *ad litem* is invalid; and when it is brought to the notice of the court that an order passed by it is invalid for want of a guardian to represent the minor's interest, the court should immediately discharge the order.

Cherianujan Thirumalpad v. *Kararnamalpad* 144

Compromise:—*See* Civil Procedure Code (5*a*).

———— **deed**:—*See* Registration Act (1).

Condition, Precedent:—*See* Mortgage (1).

Construction:—*See* Evidence Act (2).

———— :—*See* Mortgage (1).

———— **of decree.**—*See* Civil Procedure Code (7).

1.———— **of document.**—*Description—Lease—Mortgage—Authority coupled with interest.*

The question of the nature of a document, whether it is a lease or mortgage, &c., must be determined not by reference to what the document describes itself to be, but by reference to the provisions of the whole instrument.

Where the defendant was put in possession of the property by the plaintiff under an instrument which provided that the defendant should manage the property for a space of 18 years and pay himself from the income thereof any advances that he might make to the plaintiff or on his behalf, but that the defendant's heirs should have no manner of right to the property and that at the end of the contract the defendant should account for the moneys that had come into his hands.

Held, that the document was neither a lease nor a mortgage but an authority coupled with an interest, that accordingly the power could not be revoked, and that the suit for account, which depended upon the validity of the revocation, was not sustainable.

Kongatti Villia Nayar v. *Subramanian Pattar* 290

2.———————— *Counterpart—Copy—Unregistered counterpart, admissibility of.*

In a suit to redeem certain lands from mortgage, a copy of the document from the Registrar's Office was tendered as secondary evidence of the deed of mortgage. Along with this another document was produced which was an exact copy of the mortgage document and the entries therein with this addition that the mortgagee finally signed the document which was designated a "Maruppattam." This was written on a stamp paper of the same value as the mortgage but was not registered. The Court of First Instance allowed the plaintiff

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to redeem the plaint lands on payment of the amount mentioned in its decree. The Court of Appeal held that this latter document was a counterpart which was primary evidence against the mortgagee but that it was inadmissible for want of registration and dismissed the plaintiff's suit.

Held, that the suit was wrongly dismissed and that the plaintiff should have been allowed to redeem on proof that the lands were comprised in the mortgage.

Per *Subrahmania Aiyar*, J.:—The document was not a counterpart, because not only the provisions of the mortgage-deed but also the signatures of the mortgagor and other entries which would be altogether out of place in a counterpart had been transcribed into it. It was only a copy acknowledged to be correct by the mortgagee. Therefore secondary evidence was admissible.

Per *Moore*, J.:—The document was counterpart and was inadmissible as evidence of mortgage. But it was admissible to show under what title the defendants entered into the lands. Since on the evidence of the document the defendant entered into the lands as mortgagee and there was no evidence of any subsequent assertion of absolute title, the defendants could not claim title to the properties by adverse possession.

The plaintiffs having established their title as jenmis might, therefore, recover the lands subject, however, to the payment of the sum of money admitted by them in their plaint to be due to the defendants.

Parameswaran Namburipad v. *Ammuni Nair* 390

Construction of order:—*See* Civil Procedure Code (14).

Contract Act, S. 25, cl. 3.—*Promise in writing to pay barred debt—Knowledge of bar—Intention to create a fresh obligation—Proposal—Acceptance—Identity of debt.*

In order to satisfy the requirements of S. 25, cl. 3, Contract Act, a document need not show any intention of creating a *fresh* obligation in consideration of the barred debt; nor need the debt be known to be barred at the date of the document.

The proposal and the acceptance need not both be in writing. A proposal in writing if accepted before the date of the suit will satisfy the terms of the statute.

The amount of the debt need not be mentioned. It is enough if the debt is mentioned in such a way as to be capable of identification.

Where a document which was relied on in answer to a plea of limitation, as containing a promise to pay the barred debt and giving a fresh starting point of limitation ran as follows: "In your letter, dated the 24th March 1898, you said that the Kattubadi from Fasli 1300 to 1307 was in arrears and that the same should be sent through the peon. There are no collections now. I shall send by the end of Vaisakha month. Please to consider":—

Held, that the document satisfied the Contract Act, S. 25, cl. 3, and that the plaintiff had three years for the date of the document within which to sue.

Varadaraja Appa Rau v. *Suryaprakasa Rau* 330

Court Fees:—*See* Transfer of Property Act (2).

———— **Act, S. 28**:—*See* Limitation Act (3).

Counterpart:—*See* Construction of document (2).

Covenant:—*See* Transfer of Property Act (6).

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Co-widows:—*See* Hindu Law (4).

Damages, action for:—*See* Cause of Action (1).

2.——————:—*See* Limitation Act (4).

Decree:—*See* Evidence Act (1).

——:—*See* Civil Procedure Code (2).

1. District Board's Act IV of 1884 (Madras) S. 180, cl. 5—*Building pyal—License from Municipal Council—Bench of Magistrates—Some not present throughout the trial—Irregularity.*

Under S. 180, cl. 5 of Madras Act IV of 1884, it is an offence to build a pyal without a license from the Municipal Council therefor, before six weeks have elapsed from the date of the application for the license.

Where only three out of six Magistrates constituting a Bench were present throughout the trial, while the other three heard only the defence and came to the same conclusion as the former three.

Held, that as the question raised in the case was one of law and was rightly decided, the irregularity was not such as to vitiate the whole proceedings and that the appeal should be dismissed

Ramasami Aiyar v. *Ambalavana Pillai* 335

2. ——————————, **Ss. 180, 263.**—*License for building with thatched roof—Illegal refusal of sanction—Building with tiled roof.*

Where an application to the Municipal Council for a license to erect a building with thatched roof was refused under a misapprehension that the land on which it was proposed to build was public land and six weeks after the date of the application the applicant erected a building with tiled roof:

Held, that sanction was illegally refused and that a roof having been mentioned in the application, the mere change in the material of the roof did not make the building substantially different from that applied for, so as to constitute an offence under S. 180 of Act IV. of 1884.

Subrahmanya Aiyar v. *Asirvadam Pillai* 337

Enfranchisement.—*See* Inam Lands (1) (2).

——————.—*See* Service Inam (4).

Estoppel.—*See* Limitation Act (3).

2. ————*See* Guardian and Wards Act.

———— **by conduct.**—*See* Civil Procedure Code (3).

Evidence—*Unregistered receipt, admissibility of, in proof of discharge—Secondary evidence of payment.*

Even though a receipt may have the effect in law of extinguishing a mortgage, it is primarily only evidence of payment and need not be registered in order to be admissible in evidence.

Where a document purporting to extinguish a mortgage is, for want of registration, inadmissible as proof of such extinguishment, it is still admissible as evidence of payment.

Oral evidence may be adduced in proof of payment though a receipt alleged to have been given for it is not produced in Court.

Appammanayuralu v. *Ramanna* 124

2. ————*See* Registration Act (1).

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1. **Evidence Act, S. 44**—*Decree—Fraud—Administration of estate—Share not allotted—Purchase of distributive share in specified properties—Suit for partition—Administration—Action.*

John Arivanandam, a native Christian, died intestate in April 1884 leaving a widow Sarah, a son and a daughter. Letters of administration were issued to Sarah and the son in January 1885. But Sarah disappeared from that time and was not heard of since. In January 1885 the plaintiff brought Civil Suit 2 of 1885 on the Original Side of the High Court against Sarah upon a promissory note alleged to have been executed by her and obtained an *ex parte* decree in the same month. In execution of the decree the plaintiff purchased the one-third share of Sarah in the properties of John Arivanandam. The present suit was brought by the plaintiff against the daughter and the daughter-in-law of John Arivanandam and their alienees for partition and recovery of Sarah's one-third share in the properties of John Arivanandam. Before the date of the present suit Arivanandam's son had died and the daughter-in-law had obtained letters of administration to the estate of Arivanandam. Neither the son nor the daughter-in-law had completed the administration of the estate of Arivanandam. In answer to the present suit the defendants contended *inter alia* that the decree had been obtained fraudulently without notice to Sarah, that the promissory note had not been executed by Sarah and had no consideration that Sarah was not alive at the date of the execution sale, that the decree and execution proceedings were therefore null and void, and that the estate not having been administered the suit for partition was unsustainable.

Held, that a party to a decree or his representatives can as defendants in a subsequent suit impeach the decree on the ground of fraud.

Held, also, that before the distribution of an estate by the administrator and the allotment of shares to the next-of-kin, a next-of-kin is not entitled to maintain a suit for the recovery of any specific share or for partition and can only bring a suit for administration making all persons interested in the estate parties to the suit.

Srirangammal v. *Sandammal* 338

2. ————**S. 92**—*Documents—Construction—Mortgage by conditional sale—Sale with a condition for re-purchase.*

Instruments creating a mortgage by conditional sale executed after the date of the Privy Council decision in *Thumbusami* v. *Hussain*, I. L. R., I. M., 1, and before the Transfer of Property Act came into force should be construed with reference to the law laid down by the series of decisions of the Madras High Court beginning from 1858 and not according to the strict law prevalent in India before 1858 and approved by the Privy Council in the decision above mentioned. The contract of mortgage so created does not, therefore, perfect into an absolute sale on the breach of the condition for repayment but still continues a mortgage, subject to the mortgagor's right to redeem within the period of limitation prescribed therefor.

Where from a sale deed and a deed of defeasance taken together, it was evident that there was an outstanding recoverable debt between the parties, and that the possession of the properties was to continue in the transferrer and not to pass to the transferee and the consideration for the contract was recited to be an existing debt and not a price settled:

Held, that the documents together constituted a mortgage by conditional sale and not a sale with a condition for re-purchase.

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Held, also, that having regard to S. 92, Evidence Act, a registered instrument cannot be cancelled except by another registered instrument. *Umedmal* v. *Motiram*, I. L. R., 2 B., 547, approved.

Ramayya v. *Krishnamma* 361

Exchange :—*See* TRANSFER OF PROPERTY ACT (6).

Exclusion from inheritance, what amounts to :—*See* HINDU LAW (8).

Execution :—*See* CIVIL PROCEDURE CODE (9) (16).

——— :—*See* LIMITATION ACT (11).

——— **Purchaser** :—*See* CIVIL PROCEDURE CODE (12).

Ex parte decree, finality of :—*See* CIVIL PROCEDURE CODE (4).

Foreign Instrument.—*See* STAMP ACT ( ).

Foreign judgment.—*Suit upon—When such suits allowable.*

A suit upon a foreign judgment will not lie unless it is for an accertained sum of money.

Sadler v. *Robinsan*, 1 Camp., 253, followed.

Sidney Smith v. *Coelho* 62

Forfeiture.—*See* LEASE (2).

———*See* MALABAR LAW (1).

Fraud.—*See* EVIDENCE ACT (1).

———, **meaning of**—*See* CIVIL PROCEDURE CODE (8).

Gift to wife.—*See* HINDU LAW (5).

Guardian *ad litem.*—*See* CIVIL PROCEDURE CODE (16).

1. ——— **and Wards Act, VIII of 1890, Ss. 7, 52**—*Declaration of guardianship, what—Representation—Estoppel.*

The acknowledgment by a District Court that a person is the guardian of another is a "declaration" of his guardianship within the meaning of S. 7, Act VIII of 1890, and the age of majority in such a case is 21.

Thiruvengadamier v. *Periasami Tevar* 24

2. ———, **Ss. 29 and 30**—*Mortgage of minor's estate—Voidability of mortgage.*

A mortgage of a minor's property executed by a guardian without the sanction of the Court is not void, but only voidable.

Where a guardian mortgaged a minor's property for the purpose of clearing off antecedent debts binding on the minor's estate, and the minor wished to avoid the mortgage.

Held, that he could not avoid the mortgage without restoring to the mortgagee the benefit that he had received thereunder.

Sinia Pillai v. *Munisami Aiyar* 64

Hereditary Office :—*See* LIMITATION ACT (5).

1. **Hindu Law** :—*See* CIVIL PROCEDURE CODE (15).

2. ——— *Adoption—Several wives—Association of one in the act of adoption—Death of adopted son—Relative rights of the mothers.*

It is competent to a person to associate any one of his several wives in the act of adoption. Thereupon that wife becomes the mother of the adopted boy and is entitled to succeed to him on his death in preference to the others who stand to him in the relation of step mothers only.

Annapurni Nachiar v. *Forbes* 209

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3. ————— Adoption—Adoption of an only son, validity of.

The adoption of an only son is valid according to the Hindu Law. And in the absence of any express prohibition by the husband the widow can validly adopt an only son.

Sri Balusu Gurulingaswami v. *Sri Balusu Ramalakshmamma* ... 6

4. ————— *Co-widows—Partition among co-widows—Right of survivorship.*

Co-widows may, by express agreement between themselves, put an end to their right of survivorship.

Ramakkal v. *Ramasami Naikan* 101

5. ————— *Gift to wife—Nature of the estate given—No evidence —Presumption.*

There is no presumption of law, that until the contrary is proved a gift to wife is of an absolute estate.

Sri Braja Kisora Devu v. *Sri Kundana Devi Patta Mahadevi* ... 157

6. ————— *Joint family—Suit by one member when allowable —Payment to another—Discharge.*

A member of a joint Hindu family, in whose name a document has been executed, can maintain a suit without joining the other members as parties, if there is nothing *in the face of* the document to show that the debt is one due to the family.

And a payment made to any member other than the one to whom the document was executed will not *generally* be a valid discharge.

Adaikalam Chetty v. *Marimuthu* 31

7. ————— *Joint Hindu family—Bond executed to one member —Payment to him—Discharge.*

Where a debt due to a joint undivided Hindu family stands in name of one member, he is *primâ facie* the person entitled to collect the debt; and a payment made to him without notice of any exclusive interest subsequently acquired by the other members validly discharges the debt.

Ramasami Chetti v. *Manikka Mudali* 155

8. ————— *Joint undivided family—Exclusion—Adverse possession—Burden of proof—Exclusion, what amounts to.*

When a member of a joint undivided Hindu family is refused a share of the family property on the ground that he has been excluded from its enjoyment for more than the statutory period, the *onus* of proving exclusion is on him who sets it up and mere absence elsewhere is not sufficient proof of such exclusion.

Machiraju v. *Simhachalam* 129

9. ————— *Joint undivided Hindu family—Mortgage executed in favour of one of the members—Suit on the mortgage by that member —Non-joinder.*

Where the contract is made with a member of a joint undivided Hindu family, he can sue upon it without joining the other members, though the contract was really entered into for the benefit of the family.

Ramanuja Chariar v. *Srinivasa Chariar* 103

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10. ——————— Maintenance—Separate property of father-in-law in the hands of his wife—Self-acquisition.

The property which a father-in-law has acquired from his maternal grandfather is not so exclusively his, as to disentitle a daughter-in-law to maintenance out of such estate.

Semble: The obligation of a father-in-law to support his daughter-in-law out of his self-acquired properties, though a moral one during his lifetime, becomes legal after his death and as against the property in the hands of his heirs;

and a devisee of the father-in-law is in no better position than the heir.

Rungammal v. *Ellammal* 14

11. ——————— *Possession of women, nature of—Adverse possession—Suit by reversioners—Alienation by person in adverse possession of limited interest.*

Where a woman takes possession of an estate which she is not entitled to take as an heir, her possession is not that of a qualified owner under the Hindu Law; it lies on the party who affirms that it is, to show that when she took possession, she did so claiming only a limited estate.

Lachhan Kunwar v. *Manorath Singh*, I. L. R., 22 C., 447, referred to.

On the death of S. in 1833 his brother's daughter-in-law took possession of the estate, his brother's son having pre-deceased him. It was found that she took possession, claiming only a widow's estate in the property. On her death in 1885, the plaintiff—reversioner of S—sued in 1894 to set aside certain alienations made by her during her lifetime.

Held, that the suit was not barred by limitation.

Bapanayya v. *Peddichalamaiya* 33

12. ——————— *Manager—Debt for family purposes.*

Where a manager of a joint family borrows for family purposes in his capacity as manager and spends the money borrowed on the family, the other members of the family are liable to pay the debt only to the extent of the family estate. They are not personally liable so as to entitle the creditor to proceed against their separate properties, if any.

Chelamayya v. *Varadayya* 3

13. ——————— *Manager—Power to refer to arbitration.*

The senior members of a joint Hindu family can bind the junior members by arbitration proceedings carried on by them in good faith.

Jagan Nath v. *Mannu Lal*, I. L. R., 16 A., 231, referred to.

Chinna Poochiammal v. *Ganga Naicker* 34

14. ——————— *Personal debt of the father—Decree—Execution against divided son—Son's liability.*

Under the Hindu law, a decree obtained against the father cannot be executed against property in the hands of a divided son, *unless* it can be proved that the partition was made with a view to defraud or delay the creditors.

Krishnaswami Konan v. *Ramaswami Aiyar* 127

15. ——————— *Widow's estate,—Waste—Quarrying stones—Reversioner's right to object—Hindu widow, status of.*

The position of a Hindu widow is not that of a mere tenant for life of the English Law. Neither is she a trustee accountable

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for the management of her property to the heirs of her husband. The quarrying of stones on land within proper limits is a mode of enjoying the land and is not a conversion of the corpus of the estate. Where money is realised by granting a lease for quarrying on the estate of a widow, the money so realised by the lease does not form part of her estate in which the reversioners have an interest, but is only the profits of her estate over which she has absolute control.

Subbareddi v. *Chengalamma* 19

16. ———— *Widow's maintenance—Personal undertaking to pay by one member of the joint family—Subsequent partition—Claim by the person to be exonerated from his undertaking.*

Where a member of an undivided family to which property had passed by survivorship on the death of a member of the family, personally undertook to pay the maintenance of the widow of the deceased, he cannot be exonerated from his liability to pay any part of the maintenance by reason of a subsequent partition among the different members of the family. The proper course is to make the widow entitled to maintenance a party to the partition and to make a provision for her in the course of that suit.

Tulasamma v. *Venkatasami* 310

17. ———— *See* WILL.

1. **Inam lands**.—*Enfranchisement—Adverse possession—Limitation.*

The Government can enfranchise an inam land so as to confer a valid title on the Inamdar, unless any other person has acquired a right to it by adverse possession for more than 60 years.

Adaikalam Katha Nadan v. *Kandasamia Pillai* 141

2. ———— *Enfranchisement—Lease, validity of—Reg. VI of* 1831—*Finality of decision by Revenue Courts.*

Where land forming a Service Inam under Reg. VI of 1831 had been leased prior to its enfranchisement and the Deputy Collector had decided that the lease was valid.

Held, that the Civil Courts could not, in a suit subsequent to the enfranchisement, go behind the decision of the Deputy Collector.

Rangiah v. *Narayanappa* 18

Irregularity:—*See* DISTRICT BOARDS ACT (1).

————:—*See* REVENUE RECOVERY ACT ( ).

1. **Jurisdiction**.—*Agency Court—High Court—Appellate jurisdiction—Right of the High Court to transfer a suit from Agency to District Court—Charter Act, S.* 15.

Within the meaning of S. 15 of the Charter Act, the High Court has appellate jurisdiction over the Agency Courts, and the District Court is a Court of jurisdiction equal to that of the Agency Court. The High Court may, therefore, under the said section, transfer a suit from the file of the Agent's Court to that of the District Court.

Per Curiam: [Section 4 of Act XXIV of 1839 which authorises the Government to make rules for guidance of Agents does not preclude the High Court from making rules under section 15 of the Charter Act to regulate the practice and proceedings of the Agent's Court.

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The Governor in Council is not authorised by section 4 to constitute any other Appellate Court than the Sudder Court, and therefore Rule 22, which provides that an appeal shall lie to the Governor in Council in the circumstances mentioned therein is *ultra vires* and illegal.]

Vikram Deo v. *Papayamma* 323

2.———— *Agency Court—Suits of the value of less than five thousand rupees—Practice.*

Though there is no provision in respect of Agent's Courts similar to S. 12 of the Civil Courts Act, the Agent's Court is one of unlimited jurisdiction and can entertain a suit of the value of less than five thousand rupees which is primarily cognisable by the Divisional Assistant.

But in a case where the suit which can be entertained by the Divisional Assistant has been improperly instituted before the Agent, the Court may refuse costs since thereby the unsuccessful party is put to the trouble of a costly appeal to the High Court or the Governor in Council.

Behara Gowrachendra v. *Vikrama Maharaja Deo* 263

3.———— *See* Civil Procedure Code (11).

4.———— *See* Rent Recovery Act (1).

5.———— *See* Revenue Recovery Act.

Jury, charge to the.—*Practice—Misdirection.*

The duty of a Judge in charging the Jury is to put the facts before them in a simple and natural manner and not to suggest far-fetched and improbable explanations as being possible explanations of facts.

Khizhakedath Unniram v. *The Queen* 380

Kanom :—*See* Malabar Law (1).

Kanom, nature of :—*See* Mortgage (2).

Kurnam, dismissal of, by Zamindar :—*See* Reg. XXV of 1802.

1. **Lease** :—*See* Rent Recovery Act (2).

2.———— *Forfeiture—Lapse of time.*

Even when the grantees under a deed of grant have alienated property contrary to its provisions, where long time has elapsed without the grantors taking any steps, and as the result of the various alienations property has again vested in the original grantees, Courts will not give effect to forfeiture clauses in the grant.

Ramanna Prabhu v. *Srinivasa Gadiyara* 11

Legal Practitioner's Act, Ss. 31 (*a*) (*b*) **and 32** :—*See* Religious Endowments Act (1).

Lessor and lessee.—*Execution-purchaser from lessee—Ignorance of lease—Privity of estate—Liability for rent—Mesne profits.*

A purchased the undivided ⅛th share of a coparcener in a Hindu family and let it on lease to the person himself. B purchased the same property in execution of a decree against the coparcener in ignorance of the limited character of his interest in it. In a suit by A against B and the members of the family for the recovery of ⅛th of the properties and mesne profits:

Held, that A was entitled to a division and delivery of the ⅛th share of the properties, that there was no privity of estate be-

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ween A and B, and that, therefore, B was not liable to pay rent to A, but that B was liable to pay mesne profits on the portion of the lands in his possession that might fall to the plaintiff's share on partition.

Nanu Iyer v. *Tulasi Vandayan* 187

Letters of Administration,—*Limitation—Delay.*

There is no period of limitation prescribed for an application for letters of administration. *Gnanamuthu Upadesi* v. *Vanakoil Pillai Nadan*, I. L. R., 17 M., 379, followed.

The executor, under the will of one M., dated December 1875, died in June 1885 without having completely administered the estate of the deceased. M.'s son, the residuary legatee, took possession of the estate and subsequently sold a house to one M. S. S. At the request of this M. S. S., and in order to confer on him a valid title to the house, M.'s son applied to the High Court for letters of administration limited to the part of the estate left unadministered by the executor. This application was made on the 21st October 1898.

Held, that the applicant was entitled to the letters limited to the unadministered part of the estate and that there being no period prescribed by the Statute of Limitations for an application of the kind, the delay of 13 years did not disentitle him to the grant of letters of administration as prayed for, especially as the object seemed to be merely to confer valid title upon the vendee.

Thiruvengada Naicker v. *Mahomed Saliah Sahib* 362

License, Municipal :—*See* DISTRICT BOARD'S ACT (1). (2).

Legal Practitioner's Act, Rules 31 (*a*), 81(*b*) and 32.—*See* RELIGIOUS ENDOWMENTS ACT (1).

Limitation:—*See* REGISTRATION ACT (2).

2.———— *See* (3).

3.———— *See* INAM LAND.

———— **Art. 11.**—*See* CIVIL PROCEDURE CODE (12).

———— **Art. 11.**—*Claim under S. 335, C. P. C.—Rejection—Regular suit—Period of limitation.*

Where a claim under S. 335, C. P. C., has been disallowed by the court, a regular suit to set aside the order and to establish the right of the claimants is governed by Art. 11 of the Limitation Act, and must be brought within one year from the date of the order.

Mahamod v. *Ayyappan* 131

3.———— **S. 14.**—*Misjoinder—Estoppel—Court Fees Act, S. 28—Stamp deficiency, payment of—Devolution of Moplah's property.*

When several members of the Mahommedan family join in one suit for partition the suit is not bad for misjoinder.

Where the defendants took exception to the plaintiffs' suit on the ground of misjoinder and the Subordinate Judge erroneously dismissed the plaintiffs' suit and the plaintiffs severally brought suits on the same claim: *held*, that the defendants were estopped from setting up the illegality of the Judge's order and that the plaintiffs were entitled to deduct the time occupied by them in jointly prosecuting their claim "diligently and in good faith." *Venkati Naik* v. *Murugappa Chetti*, I. L. R., 20 M., 48, relied on.

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Where the several plaints presented anew were not stamped properly and the plaintiffs took credit for the stamps paid by them on their joint plaint, and the Munsif first admitted and filed them without objection, but subsequently demanded additional stamps which were paid forthwith but after the claim was barred.

Held:—*Per Subrahmania Aiyar*, J.—Though the deficient stamp was levied only after the period of limitation, the plaints must be held to have been filed on the day on which they were really put in and not on the day on which the deficiency was levied. *Chennappa* v. *Raghunath*, I. L. R., 15 M., 29; *Patcha Saheb* v. *Sub-Collector of North Arcot*, I. L. R., 15 M., 78 followed; *Venkatramayya* v. *Krishnayya*, *Ib.* 20 M., 319, doubted.

Per Davies, J.—The plaints having been admitted and the Court having called upon the plaintiffs more than a year later to pay the deficiency in the stamps and such order having been complied with, the proviso to S. 28 of the Court Fees Act applied and the plaints became on payment of the deficiency "as valid as if they had been properly stamped in the first instance." *Venkataramayya* v. *Krishnayya*, I. L. R., 20 M., 319, distinguished.

In the absence of proof of any custom to the contrary, the law applicable to the devolution of a Moplah's property not held by him as a member of a tarwad subject to the Marumakkatayam law is the Mahommedan law.

Kalla Pudia Vittil Assan v. *Kunhi Pathumma* 37

4.———— **Art. 23.**—*Malicious prosecution—Suit for damages—Starting point of limitation—Acquittal—Application for revision—Order thereon.*

Under Art. 23 of the Schedule to the Limitation Act a suit for damages for malicious prosecution should be brought within one year from the date of acquittal; and when a revision petition is preferred and dismissed, there is no fresh starting point, and limitation will not commence afresh.

Mutyala Naraiya v. *Boda Seshaiya* 133

5.———— **Arts. 36, 120.**—*Hereditary office—Profits thereof, suit for—Limitation—Civil Procedure Code, S. 211—Mesne profits.*

Where the possession of a person against whom a suit is brought for recovery of possession is not totally wrongful, but under a colour of right, no claim for mesne profits can be made under S. 211, C. P. C. And a subsequent suit for the recovery of mesne profits is not barred by *res judicata*.

A suit for the recovery of profits of a hereditary office wrongfully withheld is governed by Art. 120.

Subbier v. *Ranga Aiyangar* 163

6.———— **Arts. 49 and 145.**—*Deposit of jewels—Demand and refusal.*

In cases of deposit of moveable property, where there has been a demand and refusal, a suit for the recovery of the article deposited will not be governed by Art. 145 of the Schedule to the Limitation Act but by Art. 49 and will be barred, if not brought within three years from the date of the demand and refusal.

Ramakrishna Reddy v. *Panaya Goundan* 51

7.———— **Art. 113.**—*See* Transfer of Property Act (6).

8.———— **Art. 118.**—*See* Civil Procedure Code (3).

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9.——— ——— Act XV of 1877, Arts. 124, 134, & 144.

—Trustee—Alienation of trust properties—Suit by successor to recover the properties for the trust—Limitation.

Where the trustee of a religious endowment has alienated properties belonging to it and his successor brings a suit to recover the properties for the endowment the fact that the plaintiff's predecessor neglected to perform the charities and the purchaser from him performed it regularly will not make the alienation one of a hereditary office, so as to bring the suit within the scope of Art. 124 of the Limitation Act.

Where a purchaser from a mortgagee or trustee has *actual* knowledge that his vendor was in possession of the properties only as a mortgagee or trustee, the Article of the Limitation Act applicable to a suit to recover the properties is not Art. 134 but Art. 144, *Radhanath Doss* v. *Gisborne*, 14 M., 1 A. 1; *Muthu* v. *Kambalinga*, I. L. R., 12 M., 316; and *Pandu* v. *Vithu*, I. L. R., 19 B., 140, followed.

Under the rulings of this High Court, the possession of a purchaser of trust properties from the trustee does not become adverse to the trust till the date of that trustee's death. *Mahomed* v. *Ganapathi*, I. L. R., 13 M., 277, and *Vedapuratti* v. *Vallabha*, I. L. R., 13 M., 402, followed.

Ambalavana Desigar v. *Bappu Row Jagadap* 93

10.——————Art. 175 A :—*See* Civil Procedure Code (15).

11 ——————Art. 179 :—*Suit against several—Appeal by one—Execution of decree—Limitation—Starting point.*

On the 31st March 1891, a decree was passed directing the payment of Rs. 1,523-2-0 by the first defendant and the sale of the mortgaged properties on default. The second defendant, son of the first, was made personally liable for costs. The second defendant appealed to the British Court on the ground that his share of the properties should not have been made liable for the debt. The District Judge remanded the case for disposal upon the merits so far as the claim against the second defendant was concerned. The District Munsif passed a revised decree which was confirmed on second appeal on February 22, 1897, with some modifications. The first defendant was no party to any of these proceedings. On August 7, 1897, the plaintiff applied for execution of the decree. The first defendant contended that the only decree executable against him was that of the 31st August 1891 and that the application was therefore barred.

Held, that by the appeal preferred by the second defendant, the decree against the first was imperilled and that limitation began to run only from the 22nd February 1897, when the final appellate decree was passed.

Obiter :—The language of Art. 179 is clear and postpones the starting point of limitation to the date of the appellate decree, whether the appeal is by all the parties or by only one or some of them. The 'imperilling' test is opposed to the plain language of Art. 179 and should not be allowed to disturb the starting point of limitation.

Veeraraghava v. *Ponnammal* 248

Liquidated damages :—*See* Penalty.

Madras Act I of 1876.—*Partition—Alienation.*

Partition among the members of a family is not an alienation inter se.

Venkatakrishna Rao v. *Venkata Jagga Rao* 66

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Mahomedan Law.—*Gift by husband to wife—Gift for consideration or Hebabil Ewaz possession.*

A gift by a man to his wife is no exception to the general rule of law that to constitute a valid gift actual possession or such possession of the thing given, as the nature of the case will admit, should pass to the donee. *H. M. Azim Unnissa Begum* v. *Clement Dale*, 6 M. H. C. R., 455, referred to.

Where a gift was made by a Mahomedan to his wife in consideration of the wife releasing her claim to dower:

Held, that it was a gift for consideration or *Hebabil Ewaz* known to the Mahomedan Law and that it was valid even without transmutation of possession. I. L. R., 2 C. at 197, followed.

Mahomed Esuph Ravuthan v. *Pattamsa Ammal* 185

1. **Maintenance**:—*See* Civil Procedure Code (10).

2.———————*See* Hindu Law (10).

3.———————, **suit for**:—*See* Malabar Law (12).

4.——————— **of widow**:—*See* Hindu Law (15).

1. **Malabar Law.**—*Kanom—Waste—Forfeiture—Repayment of kanom amount.*

According to the custom prevailing in Malabar, wilful and extensive waste committed by a kanomdar is a sufficient ground for the forfeiture of the kanom.

Where a kanom is so forfeited on the ground of waste, the Kanomdar does not lose his right to recover the kanom amount or any renewal fees that he might have paid to the owner of the land. *Raman Nayar* v. *Kandapuni Nayar*, 1 M. H. C. R., 445, and *Mayavanjari Chumaren* v. *Nimini Mayuran*, 2 M. H. C. R., 109, referred to.

Mallarkandi Imbi Chetti v. *Perumpulavil Narayana Menon* ... 306

2.———————*Suit for maintenance—Living away from the tarwad house—Civil Procedure Code—Suit by mother and children for maintenance—Misjoinder.*

A mother and sons, members of a Malabar tarwad, residing together, may maintain a joint suit for maintenance.

The fact that a woman now and then visits her husband in his own house does not amount to living away from the tarwad house so as to disentitle her to claim maintenance from the tarwad to which she belongs.

Raman Menon v. *Ittimayamma* 153

3.———————:—*See* Civil Procedure Code (3).

1. **Malicious prosecution**:—*See* Limitation Act (4).

2.——————— *Suit for damages—"Malice," what?*

Where a complainant states completely and truly the facts which form the basis of his complaint, the fact that he misconceived the nature and *extent* of the crime committed by the accused, will not make the complaint other than *bonâ fide*, and the complainant will not, in an action for malicious prosecution, be liable to pay damages to the accused.

Yachendrulu Varu v. *Narayanasami Chetty* 110

Manager:—*See* Hindu Law (13).

Mesne profits:—*See* Lessor and Lessee.

———————:—*See* Limitation Act (5).

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Minors:—*See* Civil Procedure Code (1). (16).

Mis-joinder:—*See* Limitation Act (3).

2.—————:—Malabar Law (2).

————— **of causes of action**:—*See* Registration Act (3).

Misrepresentation:—*See* Agency.

Money had and received:—*See* Agency ( ).

Mortgage.—*Alteration in material part—Suit for sale—Cause of action—Transferred right—Altered instrument—Condition precedent—Construction of document.*

Where the material part of a mortgage-deed ran as follows; "We shall pay you the said sum of Rs. 2,000 on the 3rd September 1894, which is the third year, or before that time, or on any other day on which the security-deed is executed either by you or by any other person on property worth Rs. 2,000 and free from all incumbrances whatever. If within the said fixed date the security is not furnished and the amount received you shall receive the principal sum without interest for the period subsequent to that or the day on which the security is furnished," and the document was altered by the mortgagee without the consent of the mortgagor by the insertion of the words "for the minor only" at the end.

Held, that the document was altered in a material part and that a suit upon the altered instrument would not lie, but that (*O'Farrell*, J., dis.) since the right to bring the properties to sale which became vested as soon as a valid mortgage was executed might be said to have been the basis of the suit, the suit could be maintained and the instrument so far as it was unaltered might be received in evidence of the rights of parties.

Held, also (*O'Farrell*, J., *dissentiente*) that upon a proper construction of the instrument the suit was maintainable without the previous tender of a proper deed of security.

Per *Subrahmania Aiyar*, J.:—The execution of the deed of security is not a condition precedent to the payment of Rs. 2,000. The meaning of the terms is that the money should become unconditionally due on the 3rd September 1894 and that payment of the money might be insisted upon even before that date if the security-deed is furnished earlier. The only penalty for not giving security before the fixed date is that he should lose all right to interest subsequent to that date.

Per *Moore*, J.:—The execution of the deed of security is not a condition precedent to the maintenance of the suit, as the terms of the bond will be satisfied even if the security-deed in proper form is executed after the date of the decree in this suit.

Per *O'Farrell*, J.:—The execution of the deed of security is a condition precedent to the maintenance of this suit. As no proper security bond has been tendered before the date of the plaint, the suit should be dismissed.

Subrahmania Aiyar v. *Krishnayyan*... 368

21 ————— *Kanom, nature of—Suit to recover kanom amount whether maintainable.*

A kanom, so far as it is a mortgage, is a usufructuary mortgage and not a combination of a usufructuary and a simple mortgage; consequently, no suit will lie for the recovery of the kanom amount.

Viyathen Sreedevi v. *Veerarayan* 108

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Mortgage by conditional sale :—*See* EVIDENCE ACT (2).

——— **by widow** ;—*See* CIVIL PROCEDURE CODE (15).

Mortgage of annuity :—*See* CIVIL PROCEDURE CODE (10).

Mortgage of minor's estate:—*See* GUARDIAN AND WARDS ACT (2).

——— **voidability of** :—*See* GUARDIAN AND WARDS ACT (2).

Non-joinder :—*See* HINDU LAW (6) (9).

——— :—*See* PRACTICE (2).

Order absolute for sale :—*See* TRANSFER OF PROPERTY ACT (5).

Parties :—*See* REDEMPTION SUIT.

Partition :—*See* EVIDENCE ACT. (1)

——— :—*See* MADRAS ACT I OF 1876.

——— **among co-widows** :—*See* HINDU LAW. (4)

Pattah.—*See* RENT RECOVERY ACT (1), (2), (4).

Penalty.—*Liquidated damages—Promise to pay additional rent in specified contingencies.*

In a deed of lease, the lessee undertook to pay the revenue due to Government, the interest due on a mortgage executed by the lessor, and 40 mudies of rice as rent to the lessor; and it was provided that if the lessee failed to pay any of these items in time, he should pay an additional rent of 5 mudies to the lessor. In an action by the lessor for the recovery of rent at the enhanced rate on the ground that the lessee failed to pay in proper time either the rent due to the lessor or the interest due to the mortgagee:

Held, that the agreement to pay additional rent was not a penalty but liquidated damages and that the lessor was entitled to recover. *Wallis* v. *Smith*, 21 Ch. D., 243, referred to, and *Lord Elphinstone* v. *Monkland Iron and Coal Company*, 11 A. C., 332, followed.

Ramanna Balkuraya v. *Sankamma* 201

Practice.—*Call for additional stamp—Boná fide mistake as to time granted—Delay.*

Where the Vakil *boná fide* believed that the time granted for the payment of additional stamp duty was fifteen days whereas it was only a fortnight and paid the money on the 30th April instead of on the 29th:

Held, that the Court had power to extend the time originally allowed, and that in the circumstances of the case, the time should have been extended and the delay excused. *Chunni Lal* v. *Ajudhia Prasad*, I. L. R., 19 A., 240, referred to.

Subrahmanyam v. *Ramaswamy* 348

2. ——— *Devasom—Uralars—Parties to suit—Non-joinder.*

A suit by a Uralan of a Devasom without making the other Uralars parties is bad for non-joinder of necessary parties and should be dismissed.

A Uralan who wishes to bring a suit should invite the other Uralars to join him as plaintiffs in the suit, and if they refuse to do so, should then join them as defendants.

Ashtamarti v. *Raman Menon* 312

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3. ———— *Reversal of judgment by the Appellate Court—Reasons for the decision.*

A Court of Appeal cannot reverse the judgment of the lower Court on mere suspicion of its incorrectness, without positively satisfying itself that the decision is wrong.

Govindan Nair v. *Cheruli Achan* 126

4. ———— :—*See* JURY, CHARGE TO THE.

5. ———— :—*See* CIVIL COURTS ACT.

6. ———— :—*See* CIVIL PROCEDURE CODE (16).

7. ———— :—*See* JURISDICTION (2).

8. ———— :—*See* RELIGIOUS ENDOWMENTS ACT. (1)

9. ———— :—*See* REGISTRATION ACT (2).

10. ———— :—*See* TRANSFER OF PROPERTY ACT. (2)

Privity of estate :—*See* LESSOR AND LESSEE.

Promissory note :—*See* STAMP ACT.

Principal's liability :—*See* AGENCY.

Proposal :—*See* CONTRACT ACT.

Quorum :—*See* TEMPLE COMMITTEE.

Ratification, subsequent :—*Docment—Forgery—Validity.*

A void transaction cannot be made good by ratification.

Ranganaikulu v. *Sattamma* 104

Receipt unregistered, admissibility in Evidence :—*See* EVIDENCE (1).

Redemption of usufructuary mortgag:—*See* TRANSFER OF PROPERTY ACT (3).

Redemption suit.—*Parties—Appeal—Mortgagees not impleaded—Whether appeal sustainable.*

In an appeal against a part of the decree for redemption, though the mortgagees may not be interested in opposing the appeal, they are necessary parties, and if the appeal is withdrawn as against them, the appeal cannot proceed against the others and will have to be dismissed.

Manakal Vasudevan v. *The Collector of Malabar* 49

1. **Registration Act**.—*Compromise deed—Title to immoveable property Unregistered deed—Evidence—Admissibility.*

An agreement of union which deals with title to immoveable property of the value of more than Rs. 100 requires registration and is inadmissible in evidence of title if unregistered.

Obiter: Where a suit relates only to *a part* of the claim arising from a cause of action and the Court passes a decree in respect of *that part* on the basis of a compromise the terms of which deal with the whole claim and are recited or referred to in the decree, the judgment of the Court is admissible as "judicial evidence" of the settlement of that part of the claim which was not dealt with in the first decree, although the deed itself may be unregistered and so inadmissible in evidence.

Pranal Annee v. *Lakshmi Annee* 147

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2. **Registration Act, S. 50** :—*Limitation—Sale of property by registered deed · Subsequent registered mortgage—Vendee's possession for more than 12 years.*

By an unregistered deed, dated the 2nd October 1876, V. P. sold a certain property to B. N. Subsequently in June 1878 he mortgaged the same property to V. C. by a registered deed of mortgage. V. C. obtained a decree on the mortgage and assigned it to the defendant who purchased the property in execution of the decree. B. N., who was in possession of the property under the sale of 1876, was not made a party to any of these proceedings. He now brought this suit for a declaration of his title, which was resisted on the ground that the title of the defendant, which ultimately depended upon a registered instrument, had priority over the unregistered sale-deed, under S. 50 of the Registration Act:

Held, that the suit was brought more than 12 years from the date of sale, that S. 50 of the Registration Act which provided for the priority of a subsequent registered over an anterior unregistered instrument, could not, in the absence of any specific provision to that effect, affect the law of limitation, and that since the plaintiff had perfected his title by lapse of the statutory period, the suit was barred.

Nellamuthu Pillay v. *Betha Naicken* 258

3. ——————**S, 77** :—*Limitation—Mode of computing time—Suit to enforce registration and declare adoption—Misjoinder of causes of action—Practice.*

In computing the period of 30 days allowed by S. 77 of the Registration Act for the institution of a suit, the day on which the order refusing to register the document was passed ought to be excluded.

In a suit brought under S. 77, no claim other than that to have the document registered can be joined. But when other claims are joined, the Court should not dismiss the suit altogether, but should direct the plaintiff to amend the plaint.

Venkataramachandra Rao v. *Veeramma* 170

Reg. XXV of 1802, S. 11 :—*Dismissal of a Kurnam by the Zemindar.*

A Zemindar cannot suspend or dismiss a Kurnam from his office, without an order of a Civil Court therefor.

Obiter: Where a dismissed Kurnam sued for restoration and claimed by way of damages the salary due for the time during which he was out of office and the Court allowed the whole claim though it was barred as to part:

Held, that the Appellate Court might, in its discretion, refuse to interfere, as the Courts were not bound to limit the damages to the salary attached to the office.

Ambalavana Pandara Sannidhi v. *Shanmugasundaram Pillai* ... 143

Religious office :—*Office-holders—Community or class—Compellable to perform the duties of office—Civil Procedure Code, S. 11—Extent of Court's interference.*

Under S. 11 of the Code of Civil Procedure, Civil Courts have jurisdiction to entertain suits relating to infringements of rights connected with an office.

The members of an ill-defined community, such as the Vaishnavas, cannot all be the holders of the Adhyapakam office. They may be entitled to join in the recitation of the *prabandhams*

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during the hours of worship, but only those of them that are attached to the temple and are compellable by the temple authorities to perform the duties of the office are the holders of the *Adhyapakam* office.

In suits relating to religious offices, the civil Courts ought not to interfere with or decide anything in reference to the rituals or ceremonials except so far as might be necessary for the protection of the office-holders in the exercise of their rights.

Srinivasa Thathachariar v. *Arayar Srinivasa Aiyangar* and *Peria Srinivasachariar* v. *Srinivasa Thathachariar* 355

1. **Religious Endowments Act, Ss. 8 and 10.**—*Appointment of a member of the Devasthanam Committee—Suit to cancel—Religion—Sect—Practice—Vakils' fees—Rules under Legal Practitioner's Act Rules* 31 (*a*), 31 (*b*) *and* 32.

Where a Vadagalai was appointed a member of the Devasthanam Committee and the appointment was contested in a regular suit on the ground that the temples of the District were mostly of the Tengalai persuasion:

Held, that the word "religion" in S. 8 of Act XX of 1863 did not mean "sect," and that the appointment of the member, who was of the same *religion* though not of the same *sect* as the temple, was legal and valid.

Where a written statement had been put in and the suit was decided after contest but the Court did not go into the merits of the case.

Held, that the case did not fall under either Rule 31 (*b*), or 32 of the Rules framed under the Legal Practitioners Act and that it was competent to the Court to award full Vakils' fees under Rule 31 (a).

Alwar Ayyangar v. *Krishnamachariar* 173

2. ———— **S. 14.**—*Breach of trust by the agent of the trustee—Suit against agent, whether maintainable under the Act.*

A mere agent of the trustee of a temple cannot be sued for breach of trust or neglect of duty under S. 14 of Act XX of 1863.

Venkatappayya v. *Venkatapathi* 105

1. **Rent Recovery Act, Madras VIII of 1865.**—*Patta, sole title to—Revenue Courts—Jurisdiction.*

The Revenue Courts have jurisdiction to incidentally decide a question as to title.

Thimmakkal v. *Nachiyar Ammal* 162

2. ———— *Patta—Planting trees—Improper condition—Lease of lands.*

A tenant has a right to plant trees on the lands in his holding so long as it does not materially affect the character of the holding. And a patta containing a clause prohibiting the planting of any new trees is an improper patta and need not be accepted.

Krishna Doss Balamukunda Doss v. *Venkatappa* 146

3. ———— **S. 11.**—*Rent varying varam, reverting to.*
The fact that the landlord has been receiving varying cash rents for a number of years does not give rise to an implied contract that the rent is to be paid in cash and the landlord can revert to varam rate any time.

Venkatramayya v. *Gangânna*... 26

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4. ———————, **Ss. 9 and 51.**—*Tender of patta—Refusal to accept—Second tender—Limitation.*

A landlord may within the fasli tender a second patta if he thinks that the first was improper; and a suit to compel the acceptance of such amended patta is within time if brought within two months of its date.

Krishna Doss Balamukunda Doss v. *Guruva Reddi* 183

Res judicata.—*See* CIVIL PROCEDURE CODE (4).

2. ———————*See* INAM LAND.

Resolution.—*See* TEMPLE COMMITTEE.

Revenue Recovery Act, Madras II of 1864, Ss. 38 and 59.—*Revenue sale—Suit to set aside—Jurisdiction—Omission to put up notice of sale in the Collector's Office—"Material" irregularity.*

Where under the 1st clause of S. 38 of Act II of 1864 an application was made to the Collector to set aside a revenue sale on the ground of irregularity, and the Collector refused to interfere on the ground that the irregularity was not material and was not proved to have caused any loss:

Held, that under S. 59 of the Act the District Court had jurisdiction to entertain a suit to set aside the sale.

Held, also, that in such a suit the Court could not give relief on the mere ground of irregularity without further proof that it was a material one and had caused substantial injury to the plaintiffs.

The omission to put up a notice of the sale at the Collector's Office, which is far away from the scene of the revenue sale, cannot be said to have led to a paucity of bidders at the place of auction and to have occasioned a fall in the price of the properties sold.

Periathambi Bommiah v. *Chithambaram Chettiar* 190

Revenue Court.—*See* RENT RECOVERY ACT (1).

Revenue Sale, suit to set aside.—*See* REVENUE RECOVERY ACT.

Reversioner's right.—*See* SERVICE INAM (2).

——————— **to object to waste**:—*See* HINDU LAW (15).

Revision.—*See* CIVIL PROCEDURE CODE (1).

——— **petition.**—*See* CIVIL PROCEDURE CODE (5*a*).

Sale, by whom questionable.—*See* CIVIL PROCEDURE CODE (11).

Secondary evidence.—*See* EVIDENCE (1).

Self-acquisition.—*See* HINDU LAW (10).

1. **Service Inam.**—*Right to sue—Trustee of temple—Limitation.*

The trustee of a temple being interested in the due performance of service connected with the temple has a right to see that the property attached to an office is not improperly alienated.

Where lands attached to an office have been held in adverse possession as against an office-holder for more than 12 years, a suit to recover the lands by a subsequent holder of the same office is barred by limitation.

Chidambaram Chetty v. *Meenammall* 8

2. ———.—*Enfranchisement—Widow—Power of alienation—Right of reversioner.*

Where a service inam is enfranchised in the name of a widow who was doing the service and holding the inam at the time, the interest acquired by her in the property is complete ownership, and not the limited interest of a widow under the Hindu

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law. *Narayana* v. *Chengalamma*, I. L. R., 10 M., 1, distinguished; *Venkatrayudu* v. *Venkataramayya, ib.* 15 M., 284, and *Durgamma* v. *Virrazu Ib.*, 21 M., 47, and *Salemma* v. *Lutchmana Reddi, ib.*, 100, followed.

Subbrayya Mudali v. *Kamu Chetti* ... ... 160.

Stamp, deficiency, payment of—*See* LIMITATION ACT (3).

Stamp.—*See* PRACTICE (1).

Stamp Act, I of 1879, Ss. 5, 18 and 34.—*Promissory note—Foreign instrument—Stamp, want of—Admissibility in evidence.*

Except as provided by Ss. 5 and 18 of the Stamp Act, a foreign promissory note need not be stamped and is admissible in evidence without being so stamped.

Naina Mahomed Rowthar v. *Mahomed Husain Rowthar* 135

Succession:—*See* LIMITATION ACT (3).

Tacking.—*See* TRANSFER OF PROPERTY-ACT (2).

Temple Committee—*Resolution—Quorum—Unanimity.*

Held, that the resolution of a temple committee constituted under Act XX of 1863 need not, in order to be valid, be the unanimous resolution of all the members of the committee.

Where three out of seven members attended a meeting convened after due notice to all the members and concurred in dismissing the plaintiff from temple trusteeship;

Held, that a resolution passed by a majority of the members present at a *meeting* was valid and binding; that even if it was not law, yet in this particular case three formed the quorum under the resolution passed by the committee on the 19th of March 1879, and subsequently uniformly acted on, and that, therefore, the resolution passed by three members was not invalid in law.

Anantanarayana Iyar v. *Kutalam Pillai* 203

Transfer of appeal:—*See* CIVIL COURTS ACT.

Transfer of Property Act, S. 53.—*Law of champerty in India—Mere speculative purchase for an inadequate price not champertous.*

Mere inadequacy of consideration in respect of a purchase, without more, is no ground for holding it champertous. But it may be sufficient to make it voidable as against transferees for value under S. 53, Transfer of Property Act.

Siva Ramayya v. *Ellamma* 17

2. ————————————, **Ss. 68, 72, 74 and 95.**—*Usufructuary mortgage—Payment to prior incumbrancer—Tacking—Suit under S. 68—Practice—Court fees—Appeal against part of a decree.*

Where it is clear that the appeal relates only to a part of the decree of the lower court, a memorandum of appeal stamped with reference to such part is sufficiently stamped, notwithstanding that the grounds of the appeal may go to the root of the whole decree.

Where a usufructuary mortgagee, who never obtained possession under his mortgage, paid money to avoid a sale of the property in execution of a prior mortgage-decree and subsequently brought a suit to recover the money due on his own mortgage and that which he paid to the decree-holder, by a sale of the property which had in the meanwhile passed over by a sale to a third party:

Held, that the suit for sale should be dismissed so far as it related [and the appeal related only to it] to the money paid in discharge of the prior mortgage decree.

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Per Shephard, J. :—The payment in discharge of a prior incumbrance does not confer upon the payer any greater right than that possessed by the incumbrancer.

The money paid to the decree-holder cannot be tacked to the principal debt, first, because the payment in its nature is not one contemplated by S. 72 of the Transfer of Property Act, and, secondly, because the plaintiff was not in possession of the mortgaged property when alone S. 72 is applicable.

Per Subrahmania Aiyar, J. :—A mortgagee has, as against his mortgagor, a right to tack to the mortgage amount any money that he may have paid in discharge of prior incumbrances. But when a usufructuary mortgagee brings a suit under clauses 2 and 3 of S. 68 of the Transfer of Property Act, the decree for the mortgage money itself being only a money decree, the claim in respect of its accessory, *viz.*, the money which he is entitled to tack to it, can be in no better position, and no charge can be claimed in respect of it.

Perianna Servaigaran v. *Maduranayagam Pillay* 166

3. ————————, **Ss. 72, 74**—*Usufructuary mortgage—Payment of a prior mortgage—Redemption of the usufructuary mortgage—Subsequent suit to recover money paid.*

Where a usufructuary mortgagee paid off a prior mortgage-decree and suffered a decree for redemption without insisting on the payment of the amount so paid to the prior mortgagee, and subsequently brought a regular suit for its recovery;

Held, that if by payment of the prior mortgage-decree he acquired any rights under S. 74 of the Transfer of Property Act, his remedy was to proceed in execution, and, if he acquired any rights under S. 72, his remedy was to insist on being paid in full before he could be turned out of the lands, and that in either case a separate suit for the recovery of the money could not be sustained.

Bavanna v. Balagurivi 177

4. ————————, **S. 89**.—*Order absolute for sale.*

An order absolute for sale under S. 89 of the Transfer of Property Act is not a mere formality but an essential preliminary to the mortgaged properties being brought to sale, and all proceedings taken upon the decree without such order absolute are null and void. *Tara Prasad Roy* v. *Baobodal Roy*, I. L. R., 22 c, 931, approved.

Subrahmanyam Pillai v. *Narayana Aiyangar* 849

5. ————————, **S. 99**:—*See* Civil Procedure Code (10).

6. ————————, **S. 119**:—*Construction—Covenant—Condition subsequent—Limitation Act, Art.* 113.

[*Obiter*: Per *Subrahmania Aiyar, J.* :—Where a party to an exchange loses a portion of the lands he got on exchange and seeks to avail himself of the covenant implied by the law under S. 119 of the Transfer of Property Act, he cannot recover an equivalent portion of the lands he gave, but must set side the whole transaction and claim to be placed in the position in which he was before the exchange].

Where the parties to an exchange of lands agreed that "should any objection arise with reference thereto, equivalent land should be given back";

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Held, that the agreement constituted a covenant and not a provision for re-entry upon a condition subsequent;
that therefore a suit for the recovery of equivalent land fell under Art. 113 of the Limitation Act; and
that the suit not having been brought within three years from the date of the eviction was barred by limitation.

Veera Pillai v. *Poonnambala Pillai* 137

Trustee's right to sue:—*See* SERVICE INAM (1).

Usufructuary mortgage:—*See* TRANSFER OF PROPERTY ACT (2).

Uralars:—*See* PRACTICE (2).

Vakil's fees:—*See* RELIGIOUS ENDOWMENTS ACT (1).

Varam, reversion to:—*See* RENT RECOVERY ACT (3).

Waste:—*See* HINDU LAW (15).

——— ;—*See* MALABAR LAW (1).

Widow, status of:—*See* HINDU LAW (15).

Widow's estate:—*See* HINDU LAW (15).

——— **power of alienation**:—*See* SERVICE INAM (2).

Will:—*Hindu Law Adoption—Constituting adopted son "heir to property"—Bequest—' Persona Designata '—Alienation—Impartible Zemindar—Custom of inalienability.*

Where a Zemindar adopts a son and constitutes him heir to his property, he does not thereby undertake not to alienate property to the detriment of the adopted son, but only agrees to give him the same rights of inheritance which a natural son would have.

Where a bequest was made to a person in these terms "Though it is not specially necessary according to Hindu Law that property should be passed to the *aurasa* son by means of a will, I have written this will to declare my opinion to all people that I have according to Hindu Law passed the property to my aurasa son without property being disturbed. It is hereby settled that my entire property should go to my aurasa son Kumara Mahibati Venkata Surya Rao ...."—

Held: that the false description of the person as his aurasa son was immaterial and that the bequest to him was valid. *Fanindra D. Raikat* v. *Rajeswar Das*, 12, I. A., 72 distinguished.

Where it was admitted that there was no special family custom of inalienability but was contended that by a long series of decisions of the Sudder and the High Courts of Madras a custom of inalienability coextensive with the whole province has been established and that the decision in *Rani Sartaj Kuari* v. *Rani Deo Raj*, 15, I. A., 51 was not applicable to that province.

Held: where a custom does not profess to modify the ordinary law but merely professes to be founded upon the law as laid down by a long series of decisions, such custom has no force independently of the law and cannot be recognized after the decisions have been overruled.

Where a Zemindar can alienate property according to the decision in *Sartaj Kuari* v. *Deoraj Kuari*, he can do so by will, and the title by will, will have priority over title by succession.

Venkatasurya Mahipati v. *The Court of Wards* ... ... Sup. p. 1

Women's estate—nature of—determination of:—*See* HINDU LAW (11).

The Madras Law Journal Reports.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Davies.

Atiyandiyil ... ... Appellant* (*1st Respondent*)

v.

Lakshmi Amma and others ... Respondents (*Defendants*).

Atiyandiyil *v.* Lakshmi Amma.

Civil Procedure Code, S. 285—Attachment by a superior and an inferior court—Jurisdiction of inferior court—Irregularity of sale—Sale, by whom questionable.

Where property is attached both by an inferior and a superior court, any proceeding by the inferior court in contravention of section 285, C. P. C., would be an irregularity which would vitiate such proceedings *only if* there were notice of proceedings in the superior court. Further, the proceedings in the inferior court can be questioned only by the parties to the two proceedings and not by strangers.

Ram Narain Singh v. *Mina Koery*, I. L. R., 25 C., 46; *Abdul Karim* v. *Kakordas Tribhovandas, Ib.* 22 B., 88, followed; *Muthukaruppan* v. *Muthuramalinga, Ib.* 7 M., 47, distinguished.

Second appeal from the decree of the District Court of North Malabar in A. S. No. 166 of 1897 reversing the decree of the District Munsif of Quilandy in O. S. No. 129 of 1896.

The plaintiff sued for possession of the plaint paramba leased by T. to the 1st defendant. The plaintiff claimed title as the assignee from an auction-purchaser of the right, title and interest of T. in execution of a decree passed against him by a District Munsif's Court. The other defendants who were in possession contended that they had a prior mortgage right on the property, and that the plaintiff's sale was null and void as it had been held, they alleged, in contravention of the provisions of S. 285, Civil Procedure Code. It appeared that this property had been attached by the Sub-Court on the 11th November 1881 and the attachment continued up to 1886. The sale in execution of the Munsif's decree took place in 1884, and neither the Munsif nor the decree-holder, nor the auction-purchaser knew that an attachment by a superior court on the

* S. A. No. 262 of 1898. 9th December 1898.

Atiyandiyil v. Lakshmi Amma.

property subsisted at the date of the sale. The Munsif held that the auction-sale to the plaintiff's assignor was not void, and that the 3rd defendant's mortgage was not true, and decreed the plaintiff's suit. On appeal the District Judge held that the sale to the plaintiff's assignor by the District Munsif's Court was null and void, and dismissed the plaintiff's suit without going into the defendant's claim. The plaintiff then preferred this second appeal.

C. Krishnan for appellant.

V. Ryru Nambiar for 1st respondent.

T. M. Appu Nedungadi for 2nd respondent.

The Court delivered the following

JUDGMENT:—The Judge was, of course, right in taking the case of *Muthukaruppan* v. *Muthuramalinga*, I. L. R., 7 M. 47, as bind-upon him. But in that case the point whether there was notice of the proceeding in the superior court either to the inferior court or to the parties in the inferior court was not raised or considered. In the unreported case of this Court S. A. No. 193 of 1893, the decision in I. L. R., 7 M. 47, was distinguished on this ground, and it was held that a sale by the inferior court was not *ipso facto* null and void, and the ruling in *Bykant Nath Shaha* v. *Rajendra Narain Rai*, I. L. R., 12 C. 333, was approved and followed. The most recent decisions in Calcutta *Ram Narain Singh* v. *Mina Koery*, I. L. R., 25 C. 46, and in Bombay *Abdul Karim* v. *Kakordas Tribhovandas*, I. L. R., 22 B. 88, take the same view, holding that S. 285 of Civil Procedure Code does not take away the jurisdiction of the inferior court, and that any proceeding by the inferior court in contravention of that section would be an irregularity which would vitiate such proceedings only if there were notice of proceedings in the superior court. This question of notice could, however, only arise between the parties in the two proceedings. Strangers like the 1st and 2nd respondents are not at all entitled to impeach the proceedings in the inferior court on the ground that they were in contravention of S. 285, Civil Procedure Code.

We must, therefore, reverse the decree of the District Judge and remand the appeal for disposal on the other points according to law. Costs to abide and follow the result.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Benson.

Chelamayya ... ... Appellant* (*Plaintiff*)

v.

Varadayya and others .. ... Respts. (*Defts.* 1, 2, 4 *to* 7).

Chelamayya *v.* Varadayya.

Hindu Law—Manager—Debt for family purposes.

Where a manager of a joint family borrows for family purposes in his capacity as manager and spends the money borrowed on the family, the other members of the family are liable to pay the debt only to the extent of the family estate. They are not personally liable so as to entitle the creditor to proceed against their separate properties, if any.

Second appeal from the decree of the District Court of Godavari in A. S. No. 246 of 1896, affirming the decree of the Court of the District Munsif of Ellore in O. S. No. 306 of 1895.

The facts appear from the judgment of *Subrahmania Aiyar,* J.

R. Kuppuswami Aiyar for appellant.

C. Ramachandra Row Saheb for 3rd to 6th respondents.

The Court delivered the following

JUDGMENTS:—*Subrahmania Aiyar,* J.—The plaintiff (appellant) sues for a sum of money borrowed from him by three undivided brothers, two of whom are now dead. The first and the second defendants are the sons of the eldest of the brothers. The third is the surviving brother, and the fourth, the fifth and the sixth defendants are his sons, and the seventh defendant is the son of the third brother. All but the first, the third, the fourth and the seventh are minors. The District Judge found that the debt (which was contracted originally in 1876 when even the first and the fourth and the seventh defendants were minors) was incurred for a family purpose and, therefore, recoverable from the whole of the family estate; but he declined to grant a decree making the defendants other than the third personally liable so as to entitle the plaintiff to proceed against the self-acquired or other separate property, if any, which they possess.

The question for determination is whether the Judge is right in refusing to make such a decree. Upon the facts appearing in this

* S. A. No. 2002 of 1897. 23rd November 1898.

Chelamayya v. Varadayya.

case there can be no question that the Judge is right. No doubt, where it is shown that the contract relied on, though purporting to have been entered into by the manager only, is in reality one to which the other co-parceners are actual contracting parties either because they had agreed, before the contract was entered into, to be personally bound thereby, or because they, being in existence at the date of the contract and competent to enter into it, have subsequently duly ratified and adopted it, in that case unquestionably every such co-parcener is absolutely responsible. Equally he would be responsible though he did not assent to the *particular* contract if there had been such acquiescence on his part in the course of dealings in which the particular contract was entered into, as to warrant his being treated in the matter as a contracting party. When, however, such is not the case, but the contract is of a character such as, under the law, to entitle the manager to enter into, independently of the consent of the other members of the family, so as to bind them thereby, then it is clear that the scope of the manager's power is restricted to, and does not extend beyond, the family property. As regards the other property in the hands of a co-parcener no other co-parcener, whether he be the manager or not, has any title whatsoever. The legal individuality of a co-parcener is not merged in the manager, so far as the co-pacener's self-acquired or other separate property is concerned. Even when, under the Hindu Law according to the Smrithis, the family was paramount it did not entirely absorb the legal individuality of the members of whom it consisted. This will be clear if we turn to the rules laid down with regard to sureties. While prohibiting co-parceners from entering into transactions with each other or becoming sureties for each other in respect of their undivided property, the law permitted them to enter into contracts with each other in respect of their self-acquired property, even before partition, thereby indicating that outside the family property the co-parceners were in the position of strangers (see Narada quoted in Jagannadha's Digest, Vol. I, p. 163, Higginbotham's Edition). It follows, therefore, that the liability of the other co-parceners must be limited to their interest in the joint estate. This conclusion is strengthened by the law laid down in the analogous case of a son's liability to pay his father's personal debts. When notwithstanding the pious duty of a son, so strongly inculcated, to pay his father's debts independently of assets, the son's liability has been restricted

to the joint assets, it would be inconsistent to hold that a co-parcener's liability which never stood on an equal—much less a higher—footing, should be extended beyond the joint property. As in the one case joint property is the limit of the son's liability, so also in the other it marks the limit of the co-parcener's liability.

As under a decree for money lent to a manager alone for a family purpose "the creditor," in the words of the *Officiating Chief Justice* in the recent Full Bench case, "is seeking to do through the Court what the manager who has incurred the debt could lawfully do for himself," it follows that Courts have no authority to seize and sell in execution of such a decree the self-acquired or other separate property of co-parceners other than the manager. To hold otherwise would involve the unsustainable admission that a manager can be allowed to bring about indirectly what he cannot do directly.

The authorities to some of which our attention was drawn may now be noticed briefly. In *Ramlal Thakursidas* v. *Lakshmichand Muniram* (1 B. H. C. R. App. 51) it was no doubt held that a minor member of a family, interested in ancestral trade carried on on behalf of the family in co-partnership with a stranger, is bound by the acts of the manager necessary with reference to carrying on such trade. But nothing more was decided there. The observation in paragraph 3 in page 72 of the report, as well as the tenor of other parts of the judgment of *Sausse,* C. J., show that the rule laid down in the case is treated as an exceptional rule not to be pushed beyond its strict limits. This case was no doubt relied on in *Johurra Bibee* v. *Sreegopal* (I.L.R., 1 C., 470) by *Pontifex,* J., but only as warranting the proposition "that debts honestly incurred in carrying on such (family) business must override the rights of all the members of the joint family in property acquired with funds derived from the joint business" (*Ib.* 475). The same case was cited in *Bemola Dossee* v. *Mohun Dossee* also (I.L.R., 5 C., 792) by *Garth,* C.J., and *Pontifex,* J. But it was cited as supporting the conclusion that a manager can, in connection with joint family business, make an equitable pledge of the joint family property (*Ib.* 806). And in *Miller* v. *Ranga Nath Moulick* (I.L.R., 12 C., 389), the main proposition which *Mitter,* J., after reviewing a number of cases including the Bombay decision referred to above, laid down is "an alienation by a managing member of a joint family cannot be

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binding upon his adult co-sharers, unless it is shewn that it is made with their consent, either express or implied" (*Ib.* 399). Great stress was laid by the appellant's vakil upon an observation in two of the cases considered above, *i.e.*, *Ramlal Thakursidas* v. *Lakshmichand Muniram* and *Johurra Bibee* v. *Sreegopal Misser*, to the effect that persons carrying on a family business, in the profits of which all the members of the family would participate, must have authority to pledge the joint family credit. But clearly that refers to the credit of the family in its *quasi*-corporate character, not to the credit of each member in his individual and separate capacity. Be this as it may, in all the cases, noticed above, the transaction impeached had reference to joint property only. And no question was raised or considered in any of them as to the liability of the separate property of the co-parceners who sought to repudiate their liability in regard to such transactions. *Samalbhai Nathubhai* v. *Someshvar Mangal Harkisan* (I.L.R., 5 B., 38) and *In the matter of Haroon Mahomed* (I.L.R., 14 B., 189) are distinguishable from the present case on the ground that the persons, who were held liable there, were considered to have by their conduct constituted themselves partners which is not so here. These cases do not decide that every member of a trading family is necessarily liable as a partner. In the former of the two cases *Melvill*, J., guarded himself with the observation "whether a Hindu, who becomes entitled by inheritance, to a share in a trading business, is, *ipso facto*, and without his consent, involved in all the liabilities of a partner, it is not necessary for us to determine" (*Ib.* 40), and in the latter case *Sargent*, C. J., admitted that it was open to the party there held liable to show that he did not become a partner (*Ib.* 194). It is thus evident that none of the abovementioned cases lend support to the appellant's contention. And the decision of *Garth*, C. J., and *Markby* and *Mitter*, J.J., in *Joykisto Cowar* v. *Nittyanund Nundy* (I. L. R., 3 C., 738) is, so far as it goes, a decisive authority against the contention, inasmuch as that decision necessarily implies that as regards minors, whose guardian continues in their behalf an ancestral trade, their liability does not extend to their separate property.

Manu, Chap. VIII. 166, was also much relied on on behalf of the appellant. What, however, was intended to be emphasised by that text is merely that members who are united at the time a loan for a family purpose is incurred, are not absolved from their liability

by the fact that they subsequently became divided. This will be seen from pages 283-4 of Vol. 25, Sacred Books of the East, where Dr. Buhler says: "The meaning (of the text in question) is, as Nandana points out, that if a debt was contracted for the benefit of a united family, it must be repaid by the members of the family, though they may have separated afterwards." The term "*Swathaha*" in the original text, which is rendered by the translators "their own property," is no doubt interpreted in that way by all the commentators including Kullaka. But none of them suggests that the term includes property which has vested in the divided members otherwise than by partition. In Dr. Burnell's and Hopkins' Ordinances of Manu, the concluding part of the text in question is rendered "out of their own (property) even if they (have lived with property) divided," and in a note it is added 'divided' means having divided property (p. 205).

The tenor of the texts on the point in other Smrithies, *e.g.*, Vishnu (Sacred Books of the East, Vol. 7, para. 34, p. 45), Yajnyavalkaya (Mandlik's Hindu law, para. 45, p. 205), and Narada (Sacred Books of the East, Vol. 33, para. 13, p. 45), is such as to make one hesitate to interpret the term '*Swathaha*' in the text in question to include property in the hands of a member which did not form part of the joint family property and to take the law laid down by Manu to be in reality different from, and in advance of, that laid down by the later Smrithies. And considering that in the Dharma Sutras the law regarding separate acquisitions is seen in its first germs only (Jolly's Hindu Law, p. 94) it is highly probable that the writer of the text under consideration had, in using the term *Swathaha*, in contemplation what becomes the divided parcener's own property under the division but not any other property. It must, therefore, be taken that the appellant's contention is, as already explained, not only opposed to principle but is also unsupported by authority.

The second appeal fails and must be dismissed except to the extent that the decree, which is at variance with the judgment of the lower appellate Court, will be brought into conformity with it. The appellant must pay the respondents' costs of this appeal.

Benson, J.—I concur.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Moore.

Chidambaram Chetty and another ... Appellants* (*Plaintiffs*)

v.

Meenammall and others ... ... Respondents (*Defendants*).

Chidambaram Chetty v. Meenammall.

Service Inam—Right to sue—Trustee of temple—Limitation.

The trustee of a temple being interested in the due performance of services connected with the temple has a right to see that the property attached to an office is not improperly alienated.

Where lands attached to an office have been held in adverse possession as against an office holder for more than 12 years, a suit to recover the lands by a subsequent holder of the same office is barred by limitation.

Radhabhai v. *Anantarav*, I. L. R., 9 B., 198, approved; *Mahomed* v. *Ganapati*, 13 M., 277; *Velu Pandaram* v. *Gnanasambanda*, *Ib.* 19 M., 243, doubted.

Second appeal from the decree of the Subordinate Court of Madura (West) in A. S. No. 145 of 1897, affirming the decree of the District Munsif of Tirumangalam in O. S. No. 622 of 1895.

The plaintiffs are the Manager, Meykavalgar, and trustee of the temple. The previous Meykavalgar, Ramasami Pillai, resigned his office on the 25th December 1893, when the second plaintiff was appointed in his stead. The plaintiffs therefore brought a suit to recover the suit lands which they alleged was the manyam attached to the Meykaval service. The defendants contended that the lands belonged to the family of 1st defendant, that it was only a moiety of the melwaram that was manyam for the temple services, that the plaintiffs had no right to bring the suit and that the suit was barred by limitation. The Munsif found the following facts to be proved by the evidence in the case. The 1st defendant's ancestors were in possession of the property, at least ever since the year 1824 when a mortgage of these properties was executed by them. In 1857 one Ramasami Pillai agreed with 1st defendant's ancestors to perform the meykaval service of the temple and enjoy the lands known as Bhattavritti as remuneration therefor. However he brought a suit for the recovery of the suit lands as being attached to meykaval service. But a compromise was effected by which the said Ramasami Pillai was to enjoy Bhattavritti and perform the service. From the date of this compromise the 1st defendant and his ancestor's alienees

* S. A. No. 2059 of 1897. 31st October 1898.

Chidambaram Chetty v. Meenammal

had been in undisturbed possession of these lands. The evidence also showed that the family of Ramasami Pillai was entitled to perform the Meykaval service and that the suit lands themselves were attached to it as Inam emoluments thereof. On these facts the Munsif held that the suit was barred by limitation. The District Judge, while he was of opinion that the 2nd plaintiff alone was entitled to sue, also held that the suit was barred. Against this decision the plaintiffs appealed.

T. Rangaramanuja Chariar for appellants.

M. K. Vaidyanatha Aiyar for 3rd respondent.

K. Narayana Rao for 1st respondent.

The Court delivered the following

JUDGMENT:—The land in dispute is claimed to be attache to the office of Meykaval in the temple of which the 3rd plaintiff is the trustee. And as a person whose duty it is to see that an emolument such as the land in question is stated to be is not improperly severed from the office or interest possessed by the temple in such property prejudiced otherwise by the way in which it is dealt with, the said plaintiff must be held to possess sufficient interest in the subject of the suit to allow of his suing as plaintiff.

The next question is whether the suit is barred by limitation. There can be no doubt that it is. Though the present holder succeeded to the office in 1893, yet his predecessor who was entitled to recover possession of the land on the ground now relied on by the plaintiffs remained in office for over 12 years, but failed to sue for the property. The adverse possession thus held by the respondents during the last office holder's time clearly bars his successors too. This view, the soundness of which is shown in the elaborate judgment in *Radhabhai* and *Ramachandra Konher* v. *Anantrav Bhagvant Dehpande*, I. L. R., 9 B., 198, has been acted upon in several cases in this Court. *Mahomed* v. *Ganapati*, *Ib.* 13 M., 277, as we understand it, does not lay down a rule to the contrary. Whether *Velu Pandaram* v. *Gnana Sambanda*, *Ib.* 19 M., 243 is quite reconcileable with the rule stated above is doubtful. But as we are informed that the appeal preferred against that decision to the Judicial Committee is likely to be heard shortly, it is not necessary to pursue the point further.

The second appeal fails and is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Davies.

Magata and another ... ... Appellants* (*Plaintiffs*)

v.

Bagavan ... ... Respondent (*Defendant*).

Magata *v.* Bagavan.

Civil Procedure Code, Ss. 2, 523—Refusal to refer to arbitration—Decree.

An order under S. 523 refusing to refer a matter to arbitration is a decree within the meaning of S. 2, Civil Procedure Code.

Dayanand v. *Bakhtawar Singh*, I. L. R. 5 A., 333, dissented from.

R. Ry. Manavikrama v. *Mallichery Kristnan Nambudri*, I. L. R., 3 M., 68, commented on.

Second appeal from the decree of the District Court of Ganjam at Berhampore in A. S. No. 36 of 1896 affirming the judgment of the District Munsif of Sompet in O. S. No. 437 of 1895.

The plaintiff alleging that the parties executed a muchilika to refer the matter to arbitration, applied to the Court to file it and refer the matter to the arbitrators therein named. The Munsif was not satisfied as to the genuineness of the muchilika and dismissed the application. On appeal, the District Judge was of opinion that an order under S. 523 refusing to refer a matter to arbitration did not amount to a decree and that there was no appeal against it as S. 588 contained no provision for appeal in such a case. Against that decision the plaintiffs appealed.

T. Rangachariar for appellants.

C. R. Pattabhirama Aiyar for respondent.

The Court delivered the following

JUDGMENT:—The contention is that there is an appeal from a decision passed under S. 523, Code of Civil Procedure, refusing to refer the matter to arbitration, the grounds of refusal being that the alleged agreement to refer was not proved. The decision is one passed in a proceeding which the Legislature enacts shall be in a suit and is obviously an adjudication upon the right claimed by the plaintiff and it decided the suit. The decision, therefore, clearly falls under the definition of a decree in the Code and is appealable

* S. A. No. 1279 of 1897. 6th December 1898.

Magata v. Bagavan.

under S. 540. The ruling of the majority of the Full Bench in *Dayanand* v. *Bakhtawar Singh*, I. L. R., 5 A., 333 rests on the footing that the proceeding under S. 523 is not a suit, but it seems to us that the plain language of the section cannot be ignored, though the action is begun, not as usual by a plaint, but by an application. The reasoning of the dissenting Judge (*Oldfield*, J.) in the above case is what we prefer to adopt.

The ruling of this Court in *R. Ry. Manavikrma* v. *Mallichery Kristnan Nambudri*, I. L. R., 3 M., 68 with reference to S. 525 which contains similar language to that in S. 523 also rests on the assumption that the proceeding under that section is not a suit—a view which is not consistent with the plain terms of the section. That decision may, however, be supportable on other grounds. There is a clear distinction between the case under S. 525 where the Court refuses to file an award, and the case under S. 523 where the Court refuses to enforce an alleged agreement to submit to arbitration. In the former case, no right is conclusively negatived, for the award can be enforced by an ordinary suit. In the latter case, the right, if not enforced under S. 523, cannot be enforced at all. See S. 21 of the Specific Relief Act. In such a case, therefore, the only further remedy is by appeal. We must, therefore, reverse the decree of the lower appellate Court and remand the appeal to be heard and disposed of according to law. Costs to abide and follow the result.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Davies and Mr. Justice Boddam.

Ramanna Prabhu and others ... Appellants* (*Defendants*)

v.

Srinivasa Gadiyara ... ... Respondent (*Plaintiff*).

Ramanna Prabhu v. Srinivasa Gadiyara.

Lease—Forfeiture—Lapse of time.

Even when the grantees under a deed of grant have alienated property contrary to its proivsions, where time has elapsed without the grantors taking any steps and as the result of the various alienations property has again vested in the original grantees, Courts will not give effect to forfeiture clauses in the grant.

* S. A. No. 36 of 1898. 4th January 1899.

Ramanna Prabhu v. Srinivasa Gadiyara.

Second appeal from the decree of the District Court of South Canara in A. S. No. 72 of 1897 affirming the decree of the District Munsif of Karkal in O. S. No. 137 of 1896.

The plaintiff purchased the plaint lands from the father of defendants 1 to 3 on the 15th June 1893. On the same date he executed H, a *mulgeni* lease to the defendants 1 and 2, which provided for the forfeiture of the lease in case the lessees alienated their right by way of sale, mortgage, etc. In spite of this provision the 1st defendant granted an *arthamulgeni* lease of his half share to the 3rd defendant on the 14th July 1893 (F). Subsequently, on the 30th May 1894, the 2nd and 3rd defendants and 4th defendant (1st defendant's widow) divided the properties between themselves as if they were their family property (E). The 3rd defendant sold his ⅓ to the 2nd defendant. Thus 2nd defendant became entitled to ⅔ and 1st defendant's widow to ⅓. They both demised the holding to the 5th defendant on *Vaidegeni* tenure on the 15th November 1895 (D). The plaintiff alleging that these various alienations worked out a forfeiture under the terms of H, brought this suit for the recovery of the lands together with arrears of rent, and *hòsagme tirva* which the defendants were bound to make good under H. The Munsif found the issues in the plaintiff's favour and gave him a decree as prayed for in his plaint. The District Judge was also of opinion that the alienations were contrary to the provisons of the original lease and affirmed the decree of the Munsif; and against this the defendants appealed.

N. Subrahmanyam for appellants.

K. P. Madhava Rao for respondent.

The Court delivered the following

JUDGMENT:—It is obvious that the petitioner relied upon the lease D by the 2nd and 4th defendants to the 5th defendant as constituting a forfeiture, for he took no step to enforce the forfeiture clause until after that lease was made, though the *arthamulgeni* lease to the 3rd defendant, the partition between the defendants and the sale by the 3rd defendant to the 2nd defendant—all preceded it, and if he had considered that any of these acts constituted a forfeiture he should have instituted proceedings at once. We do not think that the lease to the 5th defendant comes

within the forfeiture clause, and it would be inequitable to decree a forfeiture upon any prior acts of the defendants having regard to the fact that they have resulted in replacing the property in the grantees of H or one of them, and, therefore, no injury has been done to the rights of the grantor. We must reverse the decision of the Courts below and order that the defendants 1 and 2 do pay the petitioner Rs. 119-14-0 on account of arrears of rent, interest and *hosagme tirva*.

Ramanna Prabhu v. Srinivasa Gadiyara.

Each party must bear and pay their own costs throughout.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Davies and Mr. Justice Boddam.

Rangiah and another ... ... Appellants* (*Defendants*)

v.

Narayanappa ... ... Respondent (*Plaintiff*).

Inam land—Enfranchisement—Lease, validity of—Reg. VI of 1831—Finality of decision by Revenue Courts.

Rangiah v. Narayanappa

Where land forming a Service Inam under Reg. VI of 1831 had been leased prior to its enfranchisement and the Deputy Collector had decided that the lease was valid.

Held: that the Civil Courts could not, in a suit subsequent to the date of enfranchisement, go behind the decision of the Deputy Collector.

Second appeal from the decree of the District Court of Bellary in A. S. No. 272 of 1895, reversing the decree of the District Munsif of Gooty in O. S. No. 243 of 1895.

The plaintiff was the lessee of the plaint lands under a cowle of 1888. These lands which were Inam were enfranchised in 1890. The defendants who subsequently purchased the lands from the Inamdars trespassed upon the lands and took possession of them in 1892. The plaintiff, therefore, brought this suit to recover the lands together with mesne profits. The defendants *inter alia* contended that the lease was invalid under the provisions of Reg. VI of 1831. In a suit before enfranchisement by the Inamdars against the present plaintiff, it had been held by the Revenue Court that the lease was valid and binding on the Inamdars. The Munsif held that he was bound by that decision as, under Reg. VI of 1831, the Deputy

*S. A. No. 91 of 1898. 4th January 1899.

Rangiah v. Narayanappa.

Collector alone had jurisdiction to try such suit before the date of enfranchisement. On appeal the decision of the Munsif was upheld by the District Judge. Against his decision the defendants preferred this second appeal.

Y. Ramaswami Aiyah for appellants.

A. T. Ambrose for respondent.

The Court delivered the following

JUDGMENT :—The lease in question having been made prior to the enfranchisement of the Inam, the question as to its validity fell to be determined under Act VI of 1831. The Deputy Collector who alone had jurisdiction under that Regulation decided that the lease was valid. It was not open to the Judge or any Civil Court to consider whether the lease was valid or otherwise under Regulation VI of 1831, and as it was not alleged that it was invalid except under the terms of that Regulation it follows that the Deputy Collector's decision that the lease is valid is binding as the District Judge has ruled. The second appeal, therefore fails and is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE OF MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Moore.

Rungammal ... ... Appellant * (*Plaintiff*)

v.

Ellammal and others ... ... Respondents (*Defendants*).

Rungammal v. Ellammal.

Hindu Law—Maintenance—Separate property of father-in-law in the hands of his wife—Self-acquisition.

The property which a father-in-law has acquired from his maternal grandfather is not so exclusively his, as to disentitle a daughter-in-law to maintenance out of such estate.

Semble: The obligation of a father-in-law to support his daughter-in-law out of his self-acquired properties, though a moral one, during his life-time, becomes legal after his death and as against the property in the hands of his heirs;

and a devisee of the father-in-law is in no better position than the heir.

Second appeal from the decree of the District Court of Coimbatore in A. S. No. 111 of 1896 reversing the decree of the Court of the District Munsif of Coimbatore in O. S. No. 74 of 1895.

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* S. A. No. 1970 of 1897. 4th November 1898.

Rungammal v. Ellammal.

The plaintiff is the daughter-in-law of the defendant. The plaintiff's husband died about six years before the date of suit, and the defendant's husband died about two years before the same date, having gifted a portion of the properties to his daughter and her children and devised the rest to his widow, the defendant. This suit was brought for the recovery of maintenance, and the plaintiff also prayed that future maintenance might be charged upon the family properties. The defendant contended that there was no ancestral property of the family, that all the properties were the self-acquisitions of her husband, and that the plaintiff was not entitled to get any maintenance out of the properties in her hands in which the plaintiff's husband had no interest. The District Munsif decided that the properties were not proved to be self-acquired and that the plaintiff's husband had an interest in the same; he, therefore, allowed an annual sum of Rs. 100 for maintenance and charged the same on all the family properties.

On appeal, however, the District Judge was of opinion that part of the properties was the self-acquired, and part, the separate properties of the defendant's husband—having been inherited by him from his maternal grandfather. He decided that the plaintiff's husband possessed no interest in either of these descriptions of properties and that, therefore, the plaintiff was not entitled to claim any maintenance out of the same. Against this decision the plaintiff preferred this second appeal.

C. R. Pattabhirama Aiyar and *S. Raghava Aiyangar* for appellant.

C. Ramachadra Rao Sabib for 1st respondent.

P. R. Ganapati Aiyar for 2nd and 3rd respondents.

The Court delivered the following

JUDGMENT :—*Subrahmania Aiyar, J.*—*Ammakannu* v. *Appu*, I. L. R., 11. M., 91, relied on, on behalf of the respondent, no doubt lays down that a Hindu is under no legal obligation to maintain his son's widow out of his self-acquired property. That case, however is not necessarily inconsistent with the doctrine adopted in 11 B. I.L.R., 199; *Janki* v. *Nand Ram, Ib.* 11 A. 194; *Kamini Dassee* v. *Chandra Pode Mondle, Ib.* 17 C. 373 and *Devi Prasad* v. *Gunwanti Koer, Ib.* 22 C. 411, cited for the appellant. According to that doctrine the

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moral obligation to support the appellant to which her father-in-law was subject would on his death have acquired the force of a legal obligation as against his assets in the hands of his heir. Consequently, the appellant must be held entitled to maintenance out of his self-acquired property in the hands of his widow, the deceased respondent, unless the fact that she took the same under his will distinguishes this case from the *ratio decidendi* of the case cited for the appellant, viz., *Adhi Bai* v. *Cursundas Nathu*. *Farran*, J., appears to have been inclined to hold that in a matter like this, a devisee would occupy a better position than an heir. The observations of the learned Judge, however, are *obiter dicta*, and even as such seem not to represent his decided opinion. I. L. R., 11 B. at p. 207. The better conclusion is perhaps that the party whose moral claim becomes a legal right would not be affected by testamentary dispositions in favor of volunteers made by the person morally bound to provide the maintenance. No doubt, if the title of the female claiming the maintenance were dependent on the volition of such a testator, he could have by his will directed that she shall get no maintenance out of his estate. But in cases like this, the title to maintenance originates from the status of the female as a member of the family acquired on her marriage, and as her right—as a legal right—comes into existence at the same moment as the dispositions in favor of the volunteer become operative, it is difficult to see how the latter could affect the former. It is not, however, necessary to put our decision in favor of the appellant on this ground, since it can well be based on another. Now it is shown by the evidence that in addition to his self-acquired property the appellant's father-in-law died possessed of property inherited by him from his maternal grandfather, or that which had been acquired with the sale-proceeds thereof. Though such property was not liable for partition at the instance of the appellant's husband, yet it having been held by the Judicial Committee that property inherited from the maternal grandfather is not self-acquired property (*Muttayan* v. *Zamindar of Sivagiri*, I. L. R., 6 M. at p. 19), the rule of non-liability established by decided cases with reference to self-acquired property ought not to be extended to inherited property of the description just referred to; especially as the theory that the right of a widowed female to maintenance is dependent on the possession by the party called upon to provide the maintenance, of assets derived from the

husband of the female claiming the maintenance appears to have had little or no foundation in the Smrithis or Commentaries. This has been clearly shown by Messrs. *West* and *Buhler* in their digest (245—252) and by Dr. *Jolly* in his History of the Hindu Law, pp. 134 and 135. The latter learned author refers to a passage from the writings of Kamalakara to show that it is incumbent on sons and grandsons to maintain indigent widows and daughters-in-law though no wealth of the father may be in existence. He also explains that the passage in the Smrithi Chandrika relied on in support of the contrary view does not really touch the point. He further points out that in Saraswathi Vilasa, p. 522, the duty of a father to provide for his son's widow is stated unconditionally.

The decree of the lower appellate Court cannot, therefore, be sustained. It is reversed and that of the District Munsif restored subject to the modification that plaint items 4, 5 and 6 which had been alienated by the father-in-law several years before his death be not charged with the appellant's maintenance. The respondent must pay the appellants' costs in this and the lower appellate Court.

Moore, J.—I concur.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Davies.

Siva Ramayya ... ... Appellant* (*Plaintiff*)

v.

Ellamma and others ... ... Respondents (*Defendants*).

Law of champerty in India—Mere speculative purchase for an inadequate price not champertous.

Transfer of Property Act, Section 53.

Mere inadequacy of consideration in respect of a purchase, without more, is no ground for holding it champertous. But it may be sufficient to make it voidable as against transferees for value under S. 53, Transfer of Property Act.

Second appeal from the decree of District Court of Cuddapah in A. S. No. 146 of 1896, affirming the decree of the District Munsif of Nandalur in O. S. No. 473 of 1895.

* S. A. No. 11 of 1898. 30th November 1898.

Siva Ramayya v. Ellamma.

The plaintiff (appellant) brought this suit for the recovery of a house and a parcel of land on the strength of an assignment, dated 10th August 1895, in his favour by the 1st defendant in the case. The 1st defendant succeeded to the property as heiress of her father Seshambotlu on the death of her mother Subbamma. Her son, the 2nd defendant, obtained the property by a deed of gift from 1st defendant's mother (and his own grandmother) and conveyed it to the other defendants in the case. The house in suit was first conveyed by 2nd defendant to the 3rd, who passed it on to the 7th and 8th defendants who are now in possession. The 5th and 6th defendants now enjoy by right of purchase the other land in parcels after it passed through the hands of the 2nd and 4th defendants successively. Defendants 1 to 3 did not appear and contest the suit. The other defendants pleaded that the plaintiff's vendor, the 1st defendant, had no title to the property in suit, that Subbamma, the mother of the 1st defendant, succeeded to the estate as heir to her son who had survived his father Seshambotlu, and not as heir to her husband's estate, that the plaintiff's right, if any, was time-barred, and, lastly, that the sale to plaintiff by 1st defendant was champertous and, consequently, void. It was found by both the lower Courts that the plaintiff was aware of the sales by the 2nd defendants to the contending defendants, that the consideration paid by plaintiff was quite inadequate, being only 50 rupees when the house alone is found to be worth 150 rupees and that the plaintiff's father was an attesting witness to the deed of gift in favour of 2nd defendant. The District Munsif, as well as the District Judge in appeal, held that the sale to plaintiff was champertous and dismissed the plaintiff's suit. The other issues in the case were not decided. The plaintiff put in this second appeal.

T. V. Seshagiri Aiyar for appellant.

S. Gurusami Chetty for respondents.

Seshagiri Aiyar.—The specific English Law of champerty does not apply in India. *Ram Coomar Cundoo* v. *Chunder Canto Mookerjee*, I. L. R., 2 C., 233; *Ahmedbhoy Hubibhoy* v. *Vulleebhoy Cassumbhoy*, I. L. R., 8 B., 323. Mere inadequacy of consideration is no ground to hold that the transaction is champertous. The sale to be champertous, must be shown to be extortionate, unconscionable and inequitable and tending to promote unnecessary litigation,

Siva Ramayya v. Ellamma.

Subramania Aiyar, J.—The transaction is fraudulent—intended to defraud prior transferees and so is voidable under S. 53 of the Transfer of Property Act. You have to show that you are a *bonâ fide* purchaser.

Seshagiri Aiyar.—*Primâ facie*, it is a valid transfer. S. 53 of the Transfer of Property Act is only applicable in the case of the same transferor. In this case there are several transferors.

Gurusami Chetty.—The general principles of the English Law of champerty apply to cases in India. The consideration paid is found to be quite inadequate. The plaintiff's purchase was several years after the sale to the contending defendants and the plaintiff was also aware of these sales.

The Court delivered the following

JUDGMENT:—The suit has been dismissed on the ground that the basis of the claim was champertous. But according to the authorities on the law of champertous transactions in this country, the elements required to bring this contract within the rulings are wanting. It is not a case in which the plaintiff has acquired an improper interest in the unrighteous litigation of other people, nor is there any other circumstance making it champertous. *Gopal Ram Chander* v. *Gangaram Anandishet*, I. L. R., 14 B., 72. The transaction may, however, be voidable under S. 53 of the Transfer of Property Act at the instance of the defendants who are transferees for value. But this will depend upon the facts which have not been sufficiently gone into. We must, therefore, reverse the decrees of both the lower Courts and direct that the suit be restored to the file of the Court of First Instance for trial and disposal upon the other issues already framed and upon the issue arising with reference to S. 53 of the Transfer of Property Act. Costs hitherto incurred will abide and follow the result.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. H. H. Shephard, Officiating Chief Justice, and Mr. Justice Benson.

Subbareddi ... ... Appellant* (*5th Defendant*)

v.

Chengalamma and others. Respondents (*Plaintiffs and 1st Defendant*).

Hindu Law—Widow's estate,—Waste—Quarrying stones—Reversioner's right to object.

Subbareddi v. Chengalamma.

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* A. No. 250 of 1897. 19th October 1898.

The position of a Hindu widow is not that of a mere tenant-for-life of the English Law. Neither is she a trustee accountable for the management of her property to the heirs of her husband. The quarrying of stones on land within proper limits is a mode of enjoying the land and is not a conversion of the corpus of the estate. Where money is realised by granting a lease for quarrying on the estate of a widow, the money so realised by the lease does not form part of her estate in which the reversioners have an interest, but is only the profits of her estate over which she has absolute control.

Appeal from the decree of the District Court of Nellore in O. S. No. 8 of 1894.

The facts appear from the judgment of the *Officiating Chief Justice.*

C. R. Pattabhirama Aiyar and *P. Nagabhushanam* for appellant.

V. Bhashyam Aiyangar and *C. R. Tiruvenkatachariar* for 1st and 3rd respondents.

The Court delivered the following.

JUDGMENTS :—*The Officiating Chief Justice.*—The plaintiffs—respondents or some of them are admittedly the presumptive heirs of C. Kristappa Nayudu, entitled on the death of his widow Narayanamma. The appellant is the holder under a lease for 30 years executed by the widow on the 30th August 1868 of two villages, part of the property of the late Kristappa Nayudu. It is admitted that, under this lease and a subsequent mortgage, the appellant is entitled to hold the villages during the lifetime of the widow and her mother-in-law, the 2nd defendent. In the plaint it is alleged that the Railway authorities opened quarries in the said two villages and took out stone for which compensation was paid to the amount of Rs. 5,940-4-4. It is charged against the appellant that he improperly respresented to the Government, that he was entitled to receive this and that, notwithstanding the objection of the plaintiffs, the money was paid to the appellant. The cause of action is stated to have accrued on the date when the appellant improperly obtained the money from Government, and the plaint concludes with a prayer for a declaration that for the sum so received "with interest henceforward, the reversionary heirs of the 1st defendant are the heirs after her death and that the 5th defendant (appellant) had no right to receive the amount."

This is how the plaint stands as amended. As originally framed there was a further prayer that the money should be brought into Court. The appellant in his written statement denied the plaintiff's right to have the money brought into Court and insisted on his right as lessee of the two defendants to enjoy the produce of the two villages. He denied any injury to the permanent rights of the reversionary heirs. It may be noted that in the plaint there was no express allegation of such injury or any complaint of waste. Several issues were adjudged, but there is no definite finding on any of them, and it is somewhat difficult to say on what data the judgment is actually based. In substance, I take it, that the Judge means to find that the removal of the stone was an act which if done by the widow could not have been justified, that the money paid in compensation must be deemed to be the price paid for the stone, and that, accordingly, the money represents a part of the heritage to which ultimately the respondents may become entitled. The evidence adduced by the plaintiffs was directed to showing the nature of the ground before the quarrying took place, the extent and the results of the quarrying. There appears to be no doubt that the 13 acres in question were grazing ground; there is some evidence that quarrying had been begun on part of the land or on neighbouring land before the operations of the Railway officials began. As to the extent of these operations, the evidence of the witnesses is exceedingly vague. They say that the quarrying went on for three or four years; they are indefinite about the depth of the pits and do not venture to give an estimate of the amount of stone carried away. The only measure of it which we have is the sum awarded in compensation.

As to the result of the quarrying, the plaintiffs' witnesses say that most of the stone has been removed and that the land is no longer fit for grazing and is practically of no value. What it would cost to fill up the pits and level the ground they do not say. The Judge refers to the appellant's letter to the Collector and considers that to afford proof that the land has become 'spoiled.' The letter does not say anything of the sort; and even if it did, I do not think it would be safe to attach much weight to the terms used in such a letter of complaint. The evidence of the defendants' witnesses is of much the same character as that of the plaintiffs'. The former say the pits are much less deep than the plaintiffs' witnesses

Subbareddi *v.* Chengalamma.

assert, and that at a small cost per acre they might be filled and the land rendered fit for cultivation.

On the evidence I think it is impossible to find as a fact that the land has been ruined or rendered valueless by the operations which have been carried on, nor do I think it proved that the quarying has been conducted in such a way or to such an extent as to exhaust the resources of the land. It was argued on behalf of the respondents that the widow and her lessee must be taken to have acquiesced in the operations conducted by the Railway authorities on the land and to have consented to a conversion of part of the soil—that is part of the heritage—into money. The money received in exchange for the stone removed must, it is argued, form part of the heritage. This argument is based on the supposition that systematic quarrying on the part of a widow is an act in excess of her powers and therefore one which may be designated as waste and may entitle the reversionary heirs to an injunction. That the reversionary heirs are entitled to have the widow restrained from working destruction of the property, there can be no doubt (*Hurrydoss* v. *Runganmoney*, Sev. 657; *Gobindmani* v. *Shamlal*, Beng. F. B. 53). The question in this case is whether the quarrying, if it had been conducted by the widow, would have been a lawful act on her part. Although it does not follow that the plaintiffs are entitled to a decree against the appellant if this question is answered in the negative, it seems clear that an affirmative answer must lead to the conclusion that no suit lies against the widow or against her lessee. We were referred to some English cases on the law of waste and we were invited to treat the widow as if she were in the position of a tenant-for-life according to English Law. That is not, however, the position assigned to the widow in the cases above cited (see too *Shivaganga case*, 9 M. I. A. 604). Nor is there any case which goes the length of deciding that a widow may not open new mines or cut down timber or that, if she does so, she must account for the proceeds. The widow is certainly not in the position of a trustee accountable for her management to the heirs of her husband. If English cases are to be cited, it appears to me that the cases most nearly in point are those in which a Court of Equity has restrained tenants not impeachable for waste from doing acts which amount to a spoliation or destruction of the estate (see notes to *Garth* v. *Cotton*; *Lewis* v. *Cotton*, Tudor's L. C. on Real Property, p. 115). In the

present case, as it appears to me, the evidence falls far short of proving such case as that. It may be that quarrying except for domestic purposes had not taken place on the estate before the Railway works were opened. There was probably little or no quarrying because there was no market for the stone. The mere novelty of the operation does not show that it was an improper act on the part of the widow or that it was an act destructive of the estate. The extent of the quarrying might perhaps be material to show that spoliation and not fair use of the estate was intended. But as I have already observed it is not shown what amount of stone was taken nor what remains. All that we know is that in the course of three or four years a considerable amount of stone was taken. There is little doubt that this particular mode of enjoying the property is the most profitable, and I think the Courts ought to be slow to hold that a Hindu widow is not at liberty to use her land to her own advantage in the manner and for the purposes to which it is naturally best suited.

Holding that the plaintiffs have failed to prove a case against the widow, on the assumption that she is responsible for the acts of the Railway authorities, I do not find it necessary to embark on the further question whether any case for a declaratory decree has been established against the appellant. In my opinion the money paid to the appellant, whether it is regarded as the price of stone bought or compensation for wrong done, is part of the produce of the estate and cannot be treated as part of the estate itself. Accordingly, I reverse the decree of the District Judge and dismiss the suit with all costs.

Benson, J.—We are asked to uphold the decision of the District Judge on the ground that there has been a virtual conversion of a part of the corpus of the estate—that is of the heritage—from land into money, and that the plaintiffs are, therefore, entitled to regard that money as part of the estate and to protect the ultimate interests of the reversioners therein by obtaining the declaration sought for in the plaint. I do not think that there is any sound basis for this contention. It is true that stone has been quarried and sold as a source of profit off part of the estate, but I think it is impossible to hold that this amounts to a destruction of the land where the quarries were worked. At most it is but the removal of a portion

Subbareddi *v.* Chenga-lamma.

of the surface of the ground. There can be no doubt but that by a moderate expenditure, not, perhaps, by the expenditure of so small a sum as Rs. 5 per acre, as some of the witnesses say, but still by a moderate expenditure, the ground could be made fit for cultivation or at least for grazing—the purpose to which it was formerly applied. It is also certain that the quarries are not really exhausted, but could still be worked, though at a greater depth and, therefore, with less profit than heretofore. In these circumstances, I am of opinion that it would be pushing the rights of reversioners to an undue length to say that they are entitled to claim that the money realized by the widow or her lessees by working the quarries should be set apart as a fund for their ultimate benefit. No authority in the Hindu law or in reported cases in India has been cited in support of such a claim, and I doubt whether we could properly apply to a Hindu widow all the restrictions which the English law has imposed on a tenant-for-life in regard to mines, quarries, and the like. I think that in the facts of the present case the compensation paid to the widow's lessees should be regarded as profits from the lawful use of the land rather than as the proceeds of the conversion of part of the landed heritage into money. I, therefore, agree with my learned colleague in holding that the appeal must be allowed and the suit dismissed with costs throughout.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Davies and Mr. Justice Benson.

Thiruvengadamier ... ... Appellant* (*2nd Defendant*)

v.

Periasami Tevar ... ... Respondent (*Plaintiff*).

Thiru-vengadamier *v.* Periasami Tevar.

Guardian and Wards Act—VIII of 1890, Ss. 7, 52—Declaration of guardianship, what—Representation—Estoppel.

The acknowledgment by a District Court that a person is the guardian of another is a "declaration" of his guardianship within the meaning of S. 7, Act VIII of 1890, and the age of majority in such a case is 21.

Second appeal from the decree of the Subordinate Judge's Court of Tinnevelly in A. S. No. 81 of 1896, modifying the decree of the Court of the District Munsif of Ambasamudram in O. S. No. 53 of 1894.

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* S. A No. 1371, of 1897. 20th September 1898.

On the 9th of August 1888, the plaintiff's mother executed a will by which she bequeathed all her properties to the plaintiff and appointed Hem Singh and Subramania Pillai guardians of the minor. She died shortly after. In 1881, the 1st defendant brought a suit (O. S. No. 3 of 1891) in the District Court of Tinnevelly to establish his right to be the guardian of the plaintiff. The two testamentary guardians opposed the suit. Finally, it was decided by the Court that the 1st defendant should be the guardian of the person of the minor, but that the next friends of the minor plaintiff should be the guardians for the property. On the 8th of June 1893, the 1st defendant got the plaintiff to execute a hypothecation bond for Rs. 1,700 to the 2nd defendant. On the 6th of Fubruary 1894, the plaintiff, represented by his next friends the said Hem Singh and Subramania Pillai brought this suit for a declaration that the bond executed by the minor was void for want of consideration and for the cancellation of the same. The defendants pleaded that the plaintiff was not a minor at the date of the bond, that the bond had consideration, and that even if the plaintiff was a minor, the guardians had no right to institute the suit, as the plaintiff might ratify the bond on attaining age. The Munsif considered that the effect of the decision of O. S. No. 3 of 1891 was to make the next friends guardians appointed by the Court, and held that 21 was the age of majority under the Indian Majority Act. He found also that the bond had no consideration and gave a decree for the plaintiff. The 2nd defendant appealed. The District Judge agreed with the Munsif as to the age of majority on the ground that the decree in O. S. No. 3 of 1891 if it did not "appoint" Hem Singh and Subramania Pillai guardians, might at least be said to have "declared" them to be so. As to the objection that the guardians should not institute the suit, he held that they could, and that even if they could not, the defect was cured by the plaintiff's election to proceed with the appeal on attaining age. But since he found that there was valid consideration for the bond to the extent of Rs. 178, he gave a decree for the same to the defendant. Against this decision the 2nd defendant preferred this appeal on the grounds that 21 was not the age of majority of the plaintiff, and that even if the plaintiff was a minor at the time, since the money was advanced on his representation that he was a major he was estopped from setting up his minority as a defence.

Thiruvengadamier v. Periasami Tevar.

V. Krishnaswami Aiyar and *R. Sivarama Aiyar* for appellant.

V. C. Desikachariar for respondent.

Thiruvengadamier v. Periasami Teyar.

The Court delivered the following

JUDGMENT:—We consider that the order of the District Court acknowledging the plaintiff's next friend as his guardian was a declaration of such guardianship within the meaning of S. 7 of the Guardian and Wards Act of 1890 and the age of plaintiff's majority was therefore 21 under S. 3 of the Indian Majority Act of 1875 as amended by S. 52 of the Guardian and Wards Act. There is no evidence to show that 2nd defendant was misled by any representations made by the plaintiff, and there is, therefore, no estoppel.

The second appeal is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Davies and Mr. Justice Boddam.

Venkatramayya ... ... Appellant* (*Plaintiff*)

v.

Ganganna ... ... Respondent (*Defendant*).

Venkatramayya v. Ganganna.

Rent Recovery Act, S. 11—Rent varying—Varam, reverting to.

The fact that the landlord has been receiving varying cash rents for a number of years does not give rise to an implied contract that the rent is to be paid in cash but the landlord can revert to varam rate according to local usage at any time.

Second appeal from the decree of the Subordinate Court of Kistna in A. S. No. 133 of 1896 reversing the decree of the District Munsif of Bezwada in O. S. No. 551 of 1895.

The plaintiff is the zemindar of Vallur. The defendant is his tenant. The plaintiff tendered a patta for fasli 1304 which the defendant refused to accept as illegal and improper. The plaintiff brought this suit for a declaration that the patta tendered was legal and proper and for the recovery of the rent due for fasli 1304. The plaintiff stated in the plaint that till 1873 the system of a fixed proportion of the produce in respect of dry and wet lands and of fixed cash rent in respect of garden lands was in vogue; that after 1873 the system of taking a fixed proportion was exchanged for one of varying cash rents; and that this went on till about 1888, when, owing to the tenants' refusal to pay cash rents, the plaintiff

* S. A. No. 235 of 1898. 10th January 1899.

Venkatramayya. v. Gangannna.

reverted to the original system which was in vogue before 1873 and tendered the suit patta. The defendant contended, *inter alia*, that in the year 1873 rent had been permanently settled at a fixed money rate per acre; that the plaintiff was not entitled to revert to the sharing system; and that his right to do so, if any, was barred by limitation. The Munsif found that, for about 15 years, rent had been paid in the shape of money and at varying rates, that there was no permanent settlement of rates of rent, and that the plaintiff was entitled to revert to the original system. The Subordinate Judge considered that the variation of rates was immaterial, and that there was from long user an implied contract that the money-rent system should be permanent. He, therefore, reversed the decree of the lower Court and dismissed the plaintiff's suit. Against this the plaintiff appealed.

C. R. Pattabhirama Aiyar for appellant.

N. Subrahmanyam for respondent.

The Court delivered the following

JUDGMENT:—We are clearly of opinion that, as there was no contract as to the rate of rent which varied from time to time, the plaintiff is entitled to be paid rent according to local usage, that is, according to the established varam of the village (see S. A. No. 861, &c., of 1897). We must, therefore, reverse the finding of the lower appellate Court holding that a money rent was payable and confirm the Munsif's finding that the rent should be paid by varam.

We must, therefore, set aside the decree of the lower appellate Court and remand the appeal to be heard on the merits in regard to the varam rates. The costs in the lower appellate Court will be provided for according to the result. The appellant is entitled to be paid his costs in this Court by the respondent.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Arthur J. H. Collins, *Kt.*, Chief Justice, and Mr. Justice Benson.

Venkiah ... ... Appellant* (*Plaintiff*)

v.

Raghavacharlu ... .. Respondent (*Defendant*).

Venkiah *v.* Raghava-charlu.

Civil Procedure Code, S. 230—Execution—Fraud, meaning of—Limitation.

Locking up the outer door of a house and so evading execution of a decree is "fraud" within the meaning of the term in S. 230, Civil Procedure Code, and the period of 12 years provided by that section for execution of decrees will run afresh from the date of such fraud.

Annamalai v. *Rangasami*, I. L. R., 9 M., 365, and *Bhagu Jetha* v. *Bawasaheb*, I. L. R., 9 B., 318, relied on.

Civil miscellaneous second appeal from the decree of the District Court of Nellore in A. S. No. 3 of 1894, reversing the order of the District Munsif of Kanigiri in E. P. No. 144 of 1894.

The plaintiff put in an execution petition on the 6th February, 1894; but more than 12 years had elapsed from the date of the decree before the petition was put in. In order to save it from the bar of limitation, it was mentioned in the petition that the defendant, on previous occasions when execution proceedings were taken against him, got false claim petitions put in and fraudulently delayed the plaintiffs in successfully carrying the execution to a final termination. The Munsif dismissed the application as barred by the provision of S. 230, as he considered that there was no specific allegation of fraud or force in the petition. The District Judge on an examination of the records found that in pursuance of execution proceedings instituted on the 3rd August 1882, the Court had issued a warrant of attachment on the same date; that the defendant knowing this, kept the outer door of the house locked till the day on which the warrant was returnable; and that, consequently, the warrant had to be returned unexecuted. He held that this conduct of the defendant was fraudulent within the meaning of the term "fraud" in S. 230, Civil Procedure Code, and that the present execution proceedings having been instituted within 12 years of such fraud, the petition was not barred. Against this order the defendant appealed.

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* C. M. S. A. No. 59 of 1898. 17th January 1889.

T. V. Seshagri Aiyar for appellent.

C. Ramachandra Rao Saheb for respondent.

The Court delivered the following

JUDGMENT:—We are of opinion that the order of the District Judge is right. Whatever may be said as to other attempts to execute the decree, we think that there is no doubt but that the action of the appellant in locking up his house and keeping it locked up in August 1882, when he knew that a warrant for the attachment of his moveable property had been issued, was a contrivance, or stratagem or "fraud" within the meaning of S. 230, Civil Procedure Code. *Annamalai* v. *Rangasami*, I. L. R., 6 M., 365; *Bhagu Jetha* v. *Malek Bawasaheb*, *Ib.* 9 B., 318. In consequence of this conduct of the appellant the warrant had to be returned unexecuted, and the respondent was thus for the time prevented from executing his decree by the fraud of the appellant—the judgment-debtor.

It is argued for the appellant that the respondent (judgment-creditor) had other opportunities later on for executing the decree, and that S. 230 requires that it should be shown that the judgment-debtor's fraud continued to prevent the execution of the decree right up to the date of the last application for execution. We do not understand this to be the meaning of the section. In the case reported in I. L. R., 9 B., 318, the facts of which are not unlike those of the present case, the application for execution was in June 1882. The fraud complained of was in July 1879, and there is nothing to suppose that the fraud continued to prevent the judgment-creditor from taking steps to execute the decree. It seems to us that the proviso to S. 230, Civil Procedure Code, permits the execution of a decree at any time within 12 years after the date on which the judgment-debtor has by fraud or force prevented the execution of the decree on an application properly made for execution. In other words, fraud or force gives a new starting point for the 12 years' limit. The proviso is intended to prevent the 12 years' rule of limitation being an inducement to judgment-debtors to evade execution by fraud or force with a view to obtaining the benefit of the 12 years' rule.

This view of the case is not opposed to our decision in L. P. A. No. 52 of 1898, on which the appellant's pleader relies since in that

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case the Judge had not found that execution of the decree was in fact prevented by the fraud of the judgment-debtor.

In the present case we find that the judgment-debtor did by fraud (within the meaning of S. 230, Civil Procedure Code,) prevent the execution of the decree in August at a time within 12 years immediately preceding the application for execution now before us, and that this application is, therefore, not barred by the 12 years' rule.

We dismiss the appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Davies.

Adaikalam Chetty ... ... Appellant* (*Plaintiff*)

v.

Marimuthu ... ... Respondents (*Defendants*).

Adaikalam Chetty *v.* Marimuthu.

Hindu Law—Joint family—Suit by one member, when allowable—Payment to another—Discharge.

A member of a joint Hindu family, in whose name a document has been executed, can maintain a suit without joining the other members as parties, if there is nothing *in the face of* the document to show that the debt is one due to the family.

Bungsee Singh v. *Soodish Lall*, I. L. R., 7 C. 739; *Dayabhai Lallubhai* v. *Gopalji Dayabhai*, I. L. R., 18 B. 141; and *Hari Vasudev Kamat* v. *Mahadu Dad Gavda*, I. L. R., 20 B. 435, approved.

And a payment made to any member other than the one to whom the document was executed will not *generally* be a valid discharge.

Second appeal from the decree of the Subordinate Judge's Court of Kumbakonam in A. S. No. 468 of 1897, reversing the decree of the District Munsif of Patukotta in O. S. No. 351 of 1896.

This was a suit upon a hypothecation bond for the recovery of Rs. 635-13-0. The plaintiff produced a registration copy of the bond, alleging that the original was with his brothers and that they refused to deliver it to him. The defendants pleaded that their father's undivided brothers' sons who were interested in the hypotheca should be parties to the suit, that the bond having been executed to the plaintiff in renewal of debts due to the plaintiff's father, was family property and the undivided brothers of the plaintiff should have sued jointly with the plaintiff, and, lastly, that the bond had been discharged by payment to one of the plaintiff's brothers. The District Munsif held that the plaintiff was entitled to sue as being the manager of the family and as being the person in whose name the document was executed and that the discharge was not proved. He, therefore, gave a decree to the plaintiff as prayed for in his plaint. The Subordinate Judge, however, decided that the debt was a family property, that, therefore, the plaintiff could not sue alone for the recovery of the money, and that the discharge had been proved by the evidence of the plaintiff's brother. He, therefore,

* S. A. No. 675 of 1898, 25th January 1899.

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reversed the District Munsif's decree and dismissed the plaintiff's suit. Hence this second appeal.

V. Bhashyam Aiyangar for appellant.

C. Ramachandra Rao Saheb for respondent.

The Court delivered the following

JUDGMENT:—The first question is whether the plaintiff is entitled to sue without joining his undivided brothers, the debt being family property. We think he is entitled, inasmuch as the contract on which the suit is based is in his sole name and does not purport to have been obtained by him on behalf of any others but himself. (*Vide Bungsee Singh* v. *Soodist Lall,* I. L. R., 7 C. 739 at 745; *Dayabhai Lallubhai* v. *Gopalji Dayabhai, Ib.* 18 B. 141, and *Hari Vasudev Kamat* v. *Mahadu Dad Gavda, Ib.* 20 B. 435.) In the case of this very family, it has been previously held by this Court that the plaintiff could sue alone to enforce acceptance of puttah of family lands (S. A. 1303 of 1897).

The next question is whether the payment which the Sub-Judge would appear to have found, though his language is not clear, was made in discharge of the bond was a valid discharge as against the plaintiff. As the sole promisee under the contract the plaintiff was as regards the promisor the only person *primâ facie* entitled to payment. It therefore lay on the promisor to show that his payment to a third party was binding on the plaintiff. No circumstances justifying such payment were put forward. The only plea set up was that the payment to any member of the family is by itself necessarily binding on the member who took the contract in his own name. There is no authority for such a wide proposition. In this case there was nothing to prevent payment being made to the plaintiff himself, and no explanation is given why payment was not made to him while the fact that he was quarelling with his brothers at the time indicates that the payment was not *bonâ fide.* We must therefore reverse the decree of the lower appellate Court and restore that of the Munsif with the plaintiff's costs in this and in the lower appellate Court. Time for redemption extended to the 1st April next.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Shephard and Mr. Justice Subrahmania Aiyar.

Bapanayya ... ... Appellant* (2nd Defendant)

v.

Peddichalamaiya ... ... Respondent (*Plaintiff*).

Bapanayya *v.* Peddichalamaiya.

Hindu Law—Possession of woman, nature of—Adverse possession—Suit by reversioners—Alienation by person in adverse possession of limited interest.

Where a woman takes possession of an estate which she is not entitled to take as an heir, her possession is not that of a qualified owner under the Hindu Law; it lies on the party who affirms that it is, to show that when she took possession, she did so claiming only a limited estate.

Lachhan Kunwar v. *Manorath Ram*, I. L. R., 22 C., 447, referred to.

On the death of S. in 1833 his brother's daughter-in-law took possession of the estate, his brother's son having pre-deceased him. It was found that she took possession, claiming only a widow's estate in the property. On her death in 1885, the plaintiff—reversioner of S.—sued in 1894 to set aside certain alienations made by her during her lifetime.

Held, that the suit was not barred by limitation.

Second appeal from the decree of the Subordinate Judge's Court of Kistna at Masulipatam in A. S. No. 1320 of 1895 modifying the decree of the Court of the District Munsif of Bapatla in O. S. No. 199 of 1894.

Plaintiff sued as reversionary heir of one Brahmanna to set aside certain alienations made by Brahmanna's widow, Punnamma. It was found that one Sitaramayya, paternal uncle of Brahmanna, was the last male owner, Brahmanna having pre-deceased him, and that on Sitaramayya's death Punnamma, widow of Brahmanna, took possession of the estate as brother's daughter-in-law. The Courts below found that, although *primâ facie* Punnamma's possession will be the possession of an absolute owner still that upon the facts of the case she claimed to take only a limited estate. While so holding Punnamma alienated some properties to the defendants. Punnamma died in 1895, and the plaintiff—reversioner of Sitaramayya—brought this suit in 1894 to set aside the alienations. The lower appellate Court held that the suit was not barred by limitation. Plaintiff then preferred this second appeal.

* S. A. No. 1302 of 1897. 14th November 1898.

Bapanayya v. Peddichalamaiya.

C. R. Pattabhirama Aiyar and *P. Nagabhushanam* for appellant.

K. Narayana Rao for respondent.

The Court delivered the following

JUDGMENT:—The decision of the Privy Council in *Lachhan Kunwar* v. *Manorath Ram*, I. L. R., 22 C., 447, is an authority for the position that *primâ facie* the possession of a female member of a family not entitled to take as an heir, is not the possession of a qualified owner, and that it lies on the party who affirms it to show that when she took possession she did so claiming only a limited estate. We cannot say there is no evidence to justify the conclusion at which the Subordinate Judge has arrived, namely, that the possession of Punnamma was claimed and taken by her in virtue of a qualified and not an absolute right.

We must dismiss the second appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Davies.

Chinna Poochiammal and others ... Appellants* (*Plaintiffs*)

v.

Ganga Naicker and others ... ... Respondents (*Defendants*).

Chinna Poochiammal v. Ganga Naicker.

Hindu Law—Manager—Power to refer to arbitration.

The senior members of a joint Hindu family can bind the junior members by arbitration proceedings carried on by them in good faith.

Jagan Nath v. *Mannu Lal*, I. L. R., 16 A., 231, referred to.

Second appeal from the decree of the Subordinate Judge's Court of Tinnevelly in A. S. No. 147 of 1896 presented against the decree of the Court of District Munsif of Tuticorin in O. S. No. 419 of 1895.

The plaint land belonged to the plaintiffs by purchase under a deed of 1879. The 1st, 5th and 6th defendants having set up a right to it and professed to have leased it out to plaintiffs 3 and 4, they executed a muchilika to one Sami Chetti and referred the matter to his arbitration in the year 1892. He decided that the property belonged to the plaintiffs by purchase and that they had been in

* S. A. No. 63 of 1898. 14th December 1898.

Chinna Poochiammal v. Ganga Naicker.

possession of the land for over twelve years. The defendants acquiesced in the award and the plaintiffs were left in possession of the properties. In March 1895, the 7th defendant in collusion with the 1st defendant dispossessed the plaintiff of the land, forcibly carried away the crop which the plaintiffs had raised and were in possession of the property from that date. On these facts the plaintiffs sued to recover the land with profits. The 1st, 5th and 7th defendants pleaded that they did not accept the award and were not bound by it, that the land belonged to the defendants and was leased to the plaintiffs, and that the suit ought to be dismissed. The defendants 2, 3 and 4 alleged in addition that they were not parties to the arbitration and were not bound by the award. The Munsif held that the plaintiffs had been in possession of the lands under the purchase of 1879 for over twelve years, that the award of the arbitrator was true and binding on those who executed the muchilika, and that as to others it furnished a valuable piece of evidence and passed a decree for the plaintiffs.

The Sub-Judge, however, held that the award was invalid and that the purchase of 1879 and possession under it for over twelve years were not proved, and dismissed the plaintiffs' suit. The ground on which he held the award invalid was thus stated by him:—

"If upon the muchilika, the arbitrator had passed a decision, that would, of course, be binding on the parties thereto (*Krishna Panda* v. *Balaram Panda*, I.L.R., 19 M., 290), and possibly on the present defendants 2—4. But I observe . . . . . that the case was tried, not by Sami Chetti, the panchayetdar alone, but also by two other persons who style themselves members of the panchayet . . . . . It seems to me that the proceedings were really in the nature of a trial under Reg. V of 1816. If this were so, the punchayetdars would not be competent to dispose of the claim, as it related to the recovery of immoveable property . . . . If, however, the award was solely on the basis of the muchilika, the joinder of two other persons in the trial and decision would, of course, make it null and void (See Russell on Arbitrations, 6th ed., p. 214)."

Against this decision the plaintiffs appealed.

P. Subbiah Mudaliar for *P. R. Sundara Aiyar* for appellants.

Joseph Satya Nadar for respondents.

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The Court delivered the following

JUDGMENT :—The ground on which the Subordinate Judge went out of his way to hold the award invalid is entirely unfounded in fact. The muchilika was executed to one person, Sami Chettiyar, and the award is made in that one person's name alone. The two other persons whose signature appears in the award were clearly in the position of assessors only, and in that capacity they acted with the knowledge and consent of the defendants, as they have endorsed the muchilika and testified to the plaint put in by the defendants before the arbitrator. The award, therefore, was valid, and, of course, binding on the parties to it. The only question is whether it is binding on the defendants 2 to 4 who did not actually sign the submission to arbitration, but who are the undivided brothers of the 1st defendant and one Veerappan, deceased, who did sign the muchilika. The subject of dispute was family property, and every branch of the family was represented in the arbitration. We think there can be no doubt that it was within the power of the two elder brothers to bind their younger brothers by arbitration proceedings carried on *bonâ fide*. Cf. *Jagan Nath* v. *Mannu Lal*, I. L. R., 16 A., 231. But we also find that the defendants 2 to 4 waived their objection, inasmuch as they did not raise it in appeal, although the Court of first instance had decided it against them.

We must, therfore, reverse the decree of the Subordinate Judge and restore that of the District Munsif with the plaintiff's costs in this and the lower appellate Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyer and Mr. Justice Davies.

Kalla Pudia Vittil Assan and others ... Appellants* (*Defendants*).

v.

Kunhi Pathumma and others ... Respondents (*Plaintiffs*).

Kalla Pudia Vittil Assan *v.* Kunhi Pathumma.

Limitation Act, S. 14—Misjoinder—Estoppel—Court Fees Act, S. 28—Stamp deficiency, payment of—Devolution of Moplah's property.

When several members of the Mahomedan family join in one suit for partition the suit is not bad for misjoinder.

Where the defendants took exception to the plaintiffs' suit on the ground of misjoinder and the Subordinate Judge erroneously dismissed the plaintiffs' suit and the plaintiffs severally brought suits on the same claim, *held* that the defendants were estopped from setting up the illegality of the Judge's order and that the plaintiffs were entitled to deduct the time occupied by them in jointly prosecuting their claim "diligently and in good faith." *Venkati Naik* v. *Murugappa Chetti*, I. L. R., 20 M., 48, relied on.

Where the several plaints presented anew were not stamped properly and the plaintiffs took credit for the stamps paid by them on their joint plaint, and the Munsif first admitted and filed them without objection, but subsequently demanded additional stamps which were paid forthwith but after the claim was barred,

Held:—*Per Subrahmania Aiyar*, J.—Though the deficient stamp was levied only after the period of limitation, the plaints must be held to have been filed on the day on which they were really put in and not on the day on which the deficiency was levied. *Chennappa* v. *Raghunath*, I. L. R., 15 M., 29; *Patcha Saheb* v. *Sub-Collector of North Arcot*, I. L. R., 15 M., 78 followed; *Venkatramayya* v. *Krishnayya*, 20 M., 319, doubted.

Per Davies, J.—The plaints having been admitted and the Court having called upon the plaintiffs more than a year later to pay the deficiency in the stamps and such order having been complied with, the proviso to S. 28 of the Court Fees Act applied and the plaints became on payment of the deficiency "as valid as if they had been properly stamped in the first instance." *Venkatramayya* v. *Krishnayya*, (*supra*) distinguished.

In the absence of proof of any custom to the contrary, the law applicable to the devolution of a Moplah's property not held by him as a member of a tarwad subject to the Marumakkatayam law, is the Mahomedan law.

Second appeals from the decrees of the Subordinate Judge's Court of N. Malabar in A. S. No. 229 and others of 1896, presented against the decree of the Court of the District Munsif of Tellicherry in O. S. No. 429 and others of 1894.

* A. S. No. 1951 of 1897, and others to S. A. No. 1959 of 1897. 9th January 1897.

Kalla Pudia Vittil Assan *v.* Kunhi Pathumma.

The facts appear from the judgment of *Subrahmania Aiyar*, J.

C. Sankaran Nayar and *V. Ryru Nambiar* for appellants.

V. Krishnaswami Aiyar for *P. R. Sundara Aiyar*, *C. V. Ananthakrishna Aiyar* and *B. Govindan Nambiar* for respondents.

The Court delivered the following.

JUDGMENTS:—*Subrahmania Aiyar*, J.—The facts which have given rise to these second appeals, though complicated, may, so far as the determination of the questions raised in this Court is concerned, be stated as follows:—The property in dispute was held by one Pokker alleged by the contending defendants to have died in 1881. The plaintiffs in the nine suits are the surviving widow of Pokker and her six children by him and his two children by his other wife, deceased. They sued for a partition of the property as his heirs under the Mahomedan Law. Originally these suits were commenced as two suits. Kunhi Pathumma, the surviving widow of Pokker, and her children sued jointly, for their shares of the property, in O. S. No. 71 of 1893, on the file of the Tellicherry Sudordinate Court, instituted on the 22nd December 1893. Assan Packichiumma, Pokker's other children, sued similarly for their shares in O. S. No. 293 of 1894 in the Tellicherry District Munsif's Court on the 7th of September 1894. The latter suit was, on the 5th October 1894, transferred to the Subordinate Court to be tried with the other suit. Among the objections taken to both the suits in the Subordinate Court by the contesting defendants, one was that the plaintiffs were not entitled to sue jointly as they did. On the 5th December 1894, the Subordinate Judge passed an order holding that that objection was fatal to the entertainment of the suits but permitted the plaints to be amended so as to make each that of any one of the plaintiffs therein. Accordingly, within the time fixed by the Subordinate Judge for the amendment, *i.e.*, on the 11th December 1894, the plaint in No. 71 of 1893 was re-presented amended as the plaint of Kunhi Pathumma: while that in No. 293 of 1894 was re-presented amended on beahlf of Assan. On the same day seven separate plaints were filed in the Subordinate Court by each of the remaining plaintiffs in the two suits, Nos. 71 of 1893 and 293 of 1894. On the next day the Subordinate Judge, for the reason that value of the subject-matter, in every one of the

nine suits thus filed, was below Rs. 2,500, ordered all the plaints to be returned for presentation to the District Munsif's Court. This was done on the 17th December 1894. Two of the said plaints—those of Assan and Packichiumma—were not, however, placed on the file of the District Munsif's Court then. As the said parties had commenced their suit No. 293 of 1894 in that very Court, the District Munsif took exception to the order of the Subordinate Judge whereby their plaints were returned, and on the 17th December ordered the same to be taken back. They were, two days later, lodged once more in the Subordinate Court. But on the very next day the Subordinate Judge again returned them for reasons which it is not necessary to refer to. After some intermediate proceedings, also unnecessary to mention, the plaints were re-admitted by the Subordinate Judge on the 25th February 1895 and under the orders of the District Court transferred to the District Munsif's Court on the file whereof the plaints thus ultimately came for disposal. Among the plaints in these nine cases, seven, *viz.*, the one presented by Pakichiumma and the six presented by Kunhi Pathumma's children, were unstamped when presented to the Subordinate Court on the 11th December 1894 and to the District Munsif's Court on the 17th *idem* and remained so till the beginning of 1896. In the view I take of the case of Packichiumma, it is needless to refer to the circumstances connected with the payment of court-fees in respect of her plaint. In regard to the other six cases, however, it is necessary to enter into the details connected with the matter. Though these plaints were unstamped, each of them stated in explicit terms that the duty payable thereon was included in that paid in Kunhi Pathumma's suit. The particulars of payment therein are—

		RS.	A.	P.
Before the splitting of the claims under the order of the Subordinate Judge, dated the 5th Dec. 1894.	On the 22nd December 1893.	32	8	0
	On the 10th October 1894. (On account of increase as per Commissioner's valuation).	237	8	0
	On the 12th November 1894.	163	8	0
Subsequent thereto on the 17th December 1894 ...		68	4	0
	Total. ...	501	12	0

This sum of Rs. 501-12-0 represents correctly the amount payable upon the value of the shares of the seven plaintiffs calculating

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the court-fees on the footing that the share of each formed a distinct subject-matter. The course adopted in the said six cases with reference to the court-fees as explained above was at first accepted as correct, as will be seen from the endorsements on the plaints by the Head Clerk of the District Munsif's Court bearing date the 17th December 1894, and the documents were treated as duly stamped. But in the beginning of 1896, the District Munsif directed the plaintiffs to pay fresh court-fees and in compliance with the order they furnished Rs. 416 worth of stamps. The defendants contended that Pokker was not the exclusive owner of the property and that all these suits were barred by limitation. In the lower Courts the plea of limitation was based on the allegation that the suits were not instituted within 12 years of Pokker's death in 1881. But the lower Courts having found that Pokker died in 1882 exclusively entitled to the property, the plea was sought to be supported here on other grounds. It was urged that the period taken up in the litigation mentioned, up to the 12th December 1894 cannot, under S. 14 of the Limitation Act, be allowed in favour of the plaintiffs in computing the period of limitation, and, therefore, all the nine suits should be held to have been barred when the plaints were presented in the District Munsif's Court on the 17th December 1894, and, further, even if that time is to be allowed, in at least seven of the cases, the plea must prevail inasmuch as the plaints in them remained unstamped till after the expiry of the limitation period. Now, the two main points arising for determination are whether which of these suits, if any, are barred, and what is the law governing the devolution of the property. Before entering into the consideration of the questions it is necessary to advert to the nature of the claim made by the plaintiffs. For it is the erroneous view of the Subordinate Judge in the matter that has contributed largely to the subsequent troubles and difficulties. Now what was the nature of the claim? Whichever of the two views that can possibly be taken is adopted, there was no misjoinder of causes as was held by the Subordinate Judge. If the suits be viewed substantially as suits against trespassers, the plaintiffs, as tenants in common, were undoubtedly competent to sue together in respect of what was thus a common injury to them. (Paragraph 2, Rule 80, Dicey on Parties, page 380, and the cases referred to in illustration of that paragraph in page 380). If, on the other hand, they were suits for partition,

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which, in my opinion, they really were, *a fortiori*, the plaintiffs were entitled to join. For in a suit for partition each co-owner, as against another, occupies in himself the role of plaintiff as well as defendant. It is in consequence of this *reciprocal* character of the duty, which co-owners are subject to in the matter of partition, that even those who are not actual plaintiffs can claim that their shares also be allotted to them by the decree (Domat's Civil Law, paragraph 2757, *Sheik Khoorshed Hossein* v. *Nubbee Fatima*, I. L. R., 3 C., 551). How then can a suit, in which some of the co-owners concerned in the division seek as plaintiffs to enforce it, be objected to on the ground of such joinder? In such a case the *reciprocal* character of the right of the parties renders the cause of action the same within the meaning of S. 26 of the Code of Civil Procedure, each party, however, being entitled to separate relief.

Such being the nature of the claim, O. S. No. 293 of 1894 was not open to the objection of misjoinder of causes, and having regard to the substance of the proceedings, I think that, notwithstanding the presentation of two plaints by Assan and Pakkichiumma in pursuance of the Subordinate Judge's erroneous order, the litigation, in so far as they are concerned, ought to be held to be but a continuation of their original joint claim. *Cf. Biru Mahata* v. *Shyama Churn Khawas* (I. L. R., 22. C., 483). In this view their cases is clearly not barred by limitation as the suit was instituted within 12 years from the date of Pokker's death as found by the lower Court.

Turning now to the remaining seven suits the matter is not so clear. The plaintiffs therein having given up their suit in the Subordinate Court and instituted these others in a *different* Court, the latter suits cannot possibly be looked upon as a continuation of the joint suit in the Subordinate Court. In discussing the point of limitation in these cases it is important to bear in mind the effect as between the parties of the order of the Subordinate Judge that suit No. 71 of 1893 was unsustainable on the ground of misjoinder of causes. The appellants, whose contention to that effect prevailed under that decision cannot, as against their adversaries, who accepted and acted upon it, be heard to say that the decision is not correct. Taking, therefore, that in No. 71 of 1893 there was a misjoinder which precluded the Courts from entertaining that suit can the period during which that suit was

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prosecuted diligently and in good faith be deducted in calculating the period of limitation with reference to the present suits? In other words is the inability of a Court to entertain a suit combining causes of action which could not be combined, covered by the words, "from other cause of a like nature" in S. 14 of the Limitation Act? That it is so seems, to my mind, to follow almost necessarily from the recent Full Bench decision in *Venkati Naik* v. *Muruvappa Chetti* (I. L. R., 20 M., 48). There it was held that the time spent in the due prosecution of a suit which failed for the reason that in the plaint therein matters that could have been joined *with* leave obtained under Section 44 of the Civil Procedure Code had been joined *without* such leave, is allowable under the provision of the law referred to. When the provision thus applies to a proceeding, which becomes abortive owing to an unauthorized joinder of matters the joinder whereof the Court on application of the parties could have authorized, how can it consistently be held that the provision does not apply to a proceeding which fails on account of a misjoinder that the Court could not sanction and is prohibited by the law absolutely. Compare *Mullick Kefait Hossein* v. *Sheo Pershad Singh* (I. L. R., 23 C., 821). That O. S. No. 71 of 1893 was prosecuted in good faith is unquestionable. And as there was no suggestion and there are no reasons for thinking that the plaintiffs did not prosecute it diligently, the time during which that suit was pending must be deducted and Kunhi Pathumma's present suit held to be in time. A similar conclusion should be arrived at in her children's suits also unless the fact that the plaints therein remained unstamped until after the expiry of the limitation period necessitates a contrary decision.

This leads to the other contention urged as to limitation. No doubt, the plaintiffs had, when they presented the plaints in the Munsif's Court, paid, jointly with their mother on account of court-fees, sums aggregating to an amount equal to that properly payable by them in respect of their shares taking each share as a distinct subject-matter. But no authority has been shown for holding that they were entitled to claim, as they did, credit for the court-fees paid before the plaints were put in, *i.e.*, more than three-fourths of the total amount. These plaints, therefore, have to be considered to have been not duly stamped, if not entirely unstamped, when

the period of limitation expired. In this view the present cases cannot, in my opinion, be distinguished from *Venkatramayya* v. *Krishnayya* (I. L. R., 20 M., 319), cited for the appellants, and they should be held to be barred by limitation if the decision just referred to is to be followed. It, however, is in conflict with the decision in appeal suit No. 159 of 1893. In the latter case, the plea of limitation, raised with reference to a set-off claimed in the written statement of the defendant was similarly based on the fact that the written statement (which in regard to the amount of set-off was the plaint—*Chennappa* v. *Raghunatha*, I. L. R., 15 M. at p. 34) was not stamped as it should have been until after the period of limitation in respect of the set-off had expired. *Parker* and *Best*, J. J., dealt with the point thus:—"We now come to the defendants' claim against the plaintiff for the set-off. We attach no weight to the objection that as no court-fee was paid on the written statement when it was first filed, it cannot be levied afterwards. It was open to the Courts so to levy it, and the omission to do so for a considerable time was as much the mistake of the Court as the default of the party. The written statement was put in on the 1st of August 1891, though the court-fee was only levied in 1892. But the decisions in *Chennappa* v. *Raghunatha*, I. L. R., 15 M., 29, and *Patcha Saheb* v. *Sub-Collector of North Arcot*, I. L. R., 15 M., 78, are authority for holding that, though the deficient stamp duty was levied afterwards, the claim must be regarded as presented on the day on which it was put in. No bar of limitation, therefore, arises."

And for my own part, with all deference to my learned colleagues who took part in the case relied on by the appellants, I am unable to agree with their conclusion. There is no warrant in the Limitation Act itself for inferring that the term "plaint" in Section 4, explanation, means "a plaint duly stamped." According to the well-known rule of interpretation, words must, in the absence of any indication to the contrary, be understood in their ordinary and natural acceptation. Plaint, in law, means (has since and before the days of Blackstone, whose phraseology in regard to the explanation of the term has been accepted by Lexicographers, meant) nothing more than "a private memorial tendered to a Court in which the person sets forth his cause of action; the exhibition of an action in

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writing." In the absence of a distinct and direct statutory definition to the contrary we have no right to put a more restricted construction on the term. Certainly whether any court-fee is payable in an action commenced by the plaint, and if any is payable when and how it should be paid are manifestly matters that are entirely foreign to the question whether the particular document is a plaint or not. It is, however, proposed that S. 4 must be read with S. 28 of the Court Fees Act. No doubt it is true that in construing an Act, provisions of other statutes which are in *pari materia* may be referred to. But when the two enactments are not in *pari materia* how can one be taken to control and qualify the other? In the present instance the two enactments are quite different in their purpose and scope. The subject of court-fees with which one is concerned evidently has no real or necessary connection with the limitation of suits and proceedings to which the other is exclusively devoted. If authority were needed against reading together provisions of such unconnected and divergent statutes reference may be made to *Eyre* v. *Waller* (5 Hurlston and Norman 460) and particularly the judgment of *Wild,* C. B., who, dealing with a similar point, observed "With respect to the other Acts referred to in which the word 'Check' is introduced, they are not in *pari materia* and have a totally different scope. Nothing can be more dangerous than to construe one statute by another, especially when we consider the mode in which the statutes are framed in the present time" (*Ibid* 464). Attention may also be drawn to *Knowles and Sons* v. *Lancashire and Yorkshire Railway Company* (14 App. Ca. 248) where Lord *Halsbury,* L. C., observed, "I, for myself, decline to consider any other statute proceeding on different lines and including different provisions. * * I do not think one gets any help from the construction of other statutes passed at different times and in pursuance of different lines of thought" (*Ib.* 253). I, therefore, find it impossible to see any justification for interpolating, as the case relied on by the appellants in effect assuredly does in S. 4, after the word 'plaint,' and before the words 'is presented' a whole clause, *i.e.,* duly stamped in accordance with the law for the time being in force. Such an interpolation must, in not a few cases, cause great hardship, seeing the doubt and difficulty which not infrequently arise with reference to the determination of the exact amount of the court-fee payable in particular instances

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and considering specially the mistakes which are often committed by the Courts themselves in regard to the matter. I need hardly say that the present cases furnish a remarkable illustration of the disastrous consequences which would be caused undeservedly to suitors by adopting the construction proposed. By the memoranda attached to each of the plaints in explanation of the circumstance why the plaints themselves were not stamped, the attention of the Court was admittedly drawn to the fact that the plaintiffs treated the plaints as duly stamped for the reason stated by them—which no doubt was honestly taken by them to be good. Had the Court then informed them, as it ought to have done, that their view was wrong, they certainly would have at once furnished the requisite stamps as they did when required to do so some months later. But the plaints were received without objection and notwithstanding that the plaintiffs had eventually to pay, as already mentioned, double the amount owing to the unfortunate order of the Subordinate Judge referred to, there is no alternative left but to dismiss the suits according to the decision relied on by the appellants. And the plaintiffs must suffer, though they began the litigation in proper form and in the proper Court some nine months before the expiry of the 12 years prescribed by the law, solely and simply on account of the error committed by the Court in considering, in the first instance, that the stamp duty in respect of the plaints had been duly paid. A result so unjust ought surely to be avoided if it can be reasonably avoided. And certainly it would be if the operation of S. 28 is confined within its legitimate limits and the section held to mean that so long as any portion of the court-fees, payable under the Act in respect of a document, remain unpaid, the document shall not, for the purposes connected with the Court Fees Act, be regarded as valid, although it had been once mistakenly treated with reference to the court-fees as valid. It is not easy to see why an interpretation, so sweeping and drastic, as that suggested, tending as it does to deprive the parties of their substantive rights, should be put on what is altogether a mere fiscal enactment; particularly when it is in the power of the Courts to enforce payment up to the very last moment of the smallest fraction of the fee remaining due. It is rather strange that the very clause which is now sought to be interpolated in S. 4 should have been once introduced into it by the Legislature

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but struck out when the Bill became law, on the ground of the hardship it would cause. (See Report of Select Committee, dated the 13th June 1897). As to the argument drawn from Section 582 of the Code of Civil Procedure, I cannot see how that provision, enacted many years after the passing of the Limitation Act and having no reference to *suits*, can be taken to explain the law as to *plaints* laid down in the prior enactment. It remains to add that the view which I take, following the decision of *Parker* and *Best*, JJ., already referred to, is supported also by *Moti Sahu* v. *Chatri Das* (I. L. R., 19 C., 730), neither of which decision appears to have been brought to the notice of the Court when the ruling in question was given.

The other main point for determination in the cases is as to the law governing the devolution of the disputed property. The conclusion of the lower Courts that Pokker's paternal ancestors, and Pokker himself had all along been following the Mahomedan law was not, and could not have been, impeached considering the satisfactory evidence on which it rests. The learned vakil for the appellants, however, contented that Pakkichi, Pokker's mother, having been a member of a tarwad which held property subject to Marumakkatayam rules, even the exclusive property of Pokker, whether derived from his father or mother, passed according to the rule of that system to his mother's tarwad, but not to his heirs according to the Mahomedan law. Though the Marumakkatayam law applies to joint property, held by a Moplah as a member of a tarwad, it does not follow that it necessarily applies to property not so held. Now there can be no doubt that even in the case of Moplahs of North Malabar the Mahomedan law, as the law of their religion and their original law, is their *general* law, the Marumakkatayam rules in regard to Moplahs, who follow them, being rules of later adoption [Logan's Manual, Vol. I, 273] and forming, so far as they go in the case of such persons, *exceptional* rules modifying the general law. And though where a custom is proved to exist, it supersedes the general law, yet inasmuch as it is the latter that still regulates all beyond the custom (*Neelkisto Deb Burmono* v. *Beer-Chunder Thakur*, 12 M. I. A at p. 542), the Mahomedan law must be taken to govern the devolution of the separate and exclusive property of a Moplah, notwithstanding that he is a member of a tarwad owning property subject to Marumakkatayam law, except where it is

shown that the Mahomedan law has, also in regard to the separate and exclusive property of such a person, been superseded by rules established by usage or otherwise. That in the absence of such special rules, the Mahomedan law ought, in cases like the present, to prevail on principle and in justice becomes evident if the matter is considered somewhat closely. Now Pokker's father was unquestionably subject entirely to the Mahomedan law. Consequently, Packichi (unless there were usage to the contrary and none having been set up) must, under that law, be held to have acquired, by virtue of her marriage, a right to claim as share in her husband's estate if she survived him. And as under the said law the right to inherit is *mutual* in the case of Moslem spouses, as in the present instance (Amir Ali's Mahomedan Law, Vol. II., 118 and 158), it must be conceded that Packichi's husband, for his part, became, on his marriage, entitled to claim a share in *her exclusive* estate if she pre-deceased him. Again, as regards Moslem parents and issue also, the right of inheritance is reciprocal (Wilson's Digest of Mahomedan Law, p. 79) it must be held that Packichi possessed the right to inherit her share of the separate exclusive property left by any of her children dying in her lifetime and similarly her children surviving her had a right to take by inheritance shares in her separate and exclusive estate. To hold that Packichi did possess a title to claim shares as widow or mother but that the husband and the children did not possess corresponding rights in respect of her separate and exclusive estate would be not only quite anomalous, but highly inequitable. It follows, therefore, that the law governing the devolution of Pokker's property, derived from either parent, but not held by him as a member of a tarwad subject to Marumakkatayam law, is the Mahomedan law. The conclusion of the lower Courts on this point also is, in my opinion, correct.

I would therefore dismiss the appeals with costs of respondents other than Kunhamad Haji.

Davies, J.—The question of limitation raised in all the appeals excepting 1951 and 1956 has arisen solely through the Sub-Judge's erroneous order requiring separate plaint to be put in. The result has been that the disposal of the cases has been greatly delayed owing to their being taken out of his jurisdiction, that the plaintiffs have had to pay Court institution fees twice over, and that their

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cases have been unnecessarily laid open to attack on the ground (1) that the present plaints were not filed in time, and (2) that when filed they were not duly presented owing to their not being properly stamped. Neither of these points could have been taken, had the Sub-Judge proceeded, as he ought to have done, with the trial of the cases.

As to the first point I agree with my learned colleague that the plaintiffs are entitled to the benefit of S. 14 of the Limitation Act, and so excluding the time they were before the Sub-Judge, they were well within the limitation bar when they filed their present plaints.

As to the second point, while I also agree that the objection fails, it is on different grounds from those adopted by my learned colleague. I am unable to agree with him that the decision in I. L. R., 20 M. 319, passed by Mr. Justice *Shephard* and myself is wrong, and if it was necessary I should be prepared to support that decision by further reasons now. In my opinion, however, that ruling does not affect the present case. There the fact was that the insufficiently stamped plaint was not received, filed or acted upon by the Court through mistake or inadvertence, but was at once returned to the plaintiff as not being properly stamped. Here, the Court at first accepted and filed the plaints as being sufficiently stamped (apparently allowing the plaintiffs credit for the duties they had paid on the joint plaints) and it was not until more than a year afterwards that the Munsif came to the conclusion that a mistake had been made, and directed further fees to be paid. That order was forthwith complied with by the plaintiffs, and thereupon the plaints, under the proviso to S. 28 of the Court Fees Act, became "as valid as if they had been properly stamped in the first instance." But the plaintiffs need not rely on even this protecting clause, if, as I think, their two joint plaints originally presented should be treated as the true plaints in the case, so far as the question of stamp duty is involved, and the subsequent ones as superfluities, because those plaints were admittedly sufficiently stamped. The direction of the Sub-Judge to split them up, now that we find it was a wrong direction, cannot still operate to enhance the court-fees truly payable. These were paid at the beginning, so that I hold no question arises as to the insufficiency of stamp duties. This disposes of the

appellant's objection on the score of limitation. In other respects, I concur in the judgment of my learned colleague and to the dismissal of these second appeals with costs as directed.

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Davies.

Manakal Vasudevan ... ... Appellant* (*10th Defendant*)

v.

The Collector of Malabar and others ... Respondents (*Plaintiff and Defendants* 11 *to* 17).

Manakal Vasudevan v. The Collector of Malabar.

Parties—Suit for redemption—Appeal—Mortgagees not impleaded—Whether appeal sustainable.

In an appeal against a part of the decree for redemption, though the mortgagees may not be interested in opposing the appeal, they are necessary parties, and if the appeal is withdrawn as against them, the appeal cannot proceed against the others and will have to be dismissed.

Second appeal from the decree of the Subordinate Judge's Court of Palghat in A. S. No. 141 of 1897, presented against the decree of the District Munsif of Nedunganad in O. S. No. 212 of 1896.

This suit was brought for the redemption of a kanom and for the recovery of 11 items of property comprised therein together with rent, past and future. It was alleged in the plaint that the plaint properties belonged to the Kavalapara estate, that they were demised on kanom by one Kavalapara Nair to the 1st defendant on the 14th February 1871, that defendants 2 to 9 belonged to the same family, that the 10th defendant held *panayam* on the plaint properties, that the defendants 11 to 15 were sub-tenants, and that the defendants had declined to surrender possession of the properties on payment of kanom amount. The 1st defendant claimed Rs. 5,000 for improvements. The 10th defendant claimed Rs. 2,800 odd on his *panayam* and also contended that plot (A) was a portion of Palakat Vakka land and belonged to him in jenm. The other defendants supported these contentions. The District Munsif held that plot A. really belonged to the 10th defendant, and decreed redemption of the other properties on payment of the money due

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* S. A. 459 of 1898. 20th January 1899.

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on the kanom as no improvement had been proved. The plaintiff appealed as to plot A. Subsequently on his application the appeal was dropped as against defendants 1—9 and proceeded against the others alone. It was contended for the respondents that the suit being one to redeem a mortgage, the plaintiff could not claim any portion of the property except by impleading the mortgagees, and that since the appeal had been withdrawn as against them the appeal should be dismissed for want of necessary parties. The District Judge decided that "any party considering himself aggrieved by a portion of a decree can appeal in respect of such portion and only as against the parties in whose favour the decree is passed in respect thereof and who may be interested in resisting his claim on appeal," and that the defendants 1 to 9 who had admitted the plaintiff's right to plot A. were not necessary parties to the appeal. On the merits he found that the plot belonged to the plaintiff and allowed him to redeem all the plaint lands. From this decision the 10th defendant preferred this second appeal.

K. R. Subrahmania Sastri for appellant.

C. Sankaran Nayar for 1st respondent.

The Court delivered the following

JUDGMENT :—We cannot agree with the Sub-Judge in holding that the appeal before him could proceed after the original mortgagees (defendants 1 to 9) had been struck off from the array of parties to the appeal, on the application of the appealing plaintiff himself. The plaintiff's case was that plot A. was part of the mortgaged property which the Sub-Judge says the defendants 1 to 9 had not denied. They as the mortgagees thereof were necessary parties being interested therein. In their absence the appeal should not have been heard and determined, but dismissed. We, therefore, reverse the decree of the Sub-Judge and restore that of the District Munsif with appellant's costs in this and in the lower appellate Court. Time for redemption extended to 20th April next.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Arthur Collins, *Kt.*, Chief Justice, and Mr. Justice Benson.

Ramakrishna Reddy ... ... Appellant* (*Plaintiff*)

v.

Panaya Goundan ... ... Respondent (*Defendant*).

Ramakrishna Reddy *v.* Panaya Goundan.

Limitation Act, Arts. 49 and 145—Deposit of jewels—Demand and refusal.

In cases of deposit of moveable property, where there has been a demand and refusal, a suit for the recovery of the article deposited will not be governed by Art. 145 of the Schedule to the Limitation Act but by Art. 49 and will be barred, if not brought within three years from the date of the demand and refusal.

Appeal from the decree of the District Court of North Arcot in O. S. No. 18 of 1897.

The plaintiff brought the suit for a decree directing the defendant to deliver to the plaintiff certain moveable properties or to pay their money-value Rs. 2,835-8-0. The material allegations in the plaint were as follows:—The plaintiff deposited certain jewels with the defendant in February 1894, on the occasion of his leaving the village to arrange for the defence of his wife and brother-in-law who were charged with the offences of murder and theft, and committed to the Sessions for trial. The defendant agreed to keep the said jewels in his safe custody and secure them in his house and return the same intact to the plaintiff on demand. After the acquittal, the plaintiff was demanding of the defendant the return of the entrusted jewels on several occasions from the 20th March 1894 up to 8th May 1894. In response to the demands so made by plaintiff, the defendant, without returning the said jewels, gave evasive replies, saying that the then Magistrate of Wandiwash directed him not to return the said jewels to the plaintiff without his orders. The defendant's allegations of the Magistrate's order and of the subsequent theft would not, even if true, affect plaintiff's right. By his refusal to return the said jewels even after repeated demands, the defendant took the risk, and he was therefore liable to make good the loss of their value to the plaintiff, if he was not really in a position to return the said jewels themselves. The cause of action for the suit arose in the

* A. No. 99 of 1898. 7th January 1899.

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month of February 1894, when the jewels were entrusted to the defendant, and on the several days of demand from 20th March to 8th May 1894.

The defendant's written statement admitting the deposit proceeded to state as follows:—The defendant was taken along with the jewels before the Sub-Magistrate of Wandiwash in February 1894. The Magistrate ordered that defendant should not deliver them to the plaintiff without his orders. The plaintiff agreed to it and said he would, after the disposal of the above murder and theft case, bring and deliver the list retained by the Sub-Magistrate, obtain the orders of the Sub-Magistrate and take back the properties. In March 1894, immediately after the disposal of the murder and theft case the plaintiff asked the defendant for the return of the jewels. The defendant then asked him in accordance with what had taken place before in the Sub-Magistrate's Court to produce the list retained by the said Sub-Magistrate, compare the jewels with the list and take them, and also said that it would be better if the Magistrate's orders were obtained for their delivery. The plaintiff thereupon went away, saying that he would do so The plaintiff's suit is barred by limitation. On these allegations, the District Judge without taking any evidence held that there was an admission of demand and refusal, that the cause of action arose on the date of the first demand, and that the suit was barred under Art. 49 of the Schedule to the Limitation Act. Hence the appeal.

V. Bhashyam Aiyangar for appellant:—To the demand of the plaintiff for the return of the jewels the plaintiff only gave evasive replies. There was not such a refusal as to make the defendant's possession unlawful. The District Judge is wrong in supposing that Art. 145 of the Limitation Act is not applicable to the case. The fact that the price of the deposited jewels is asked for in the alternative does not make Art. 145 the less applicable. S. 208 of the Code of Civil Procedure provides that the decree in a suit for the recovery of movables should also direct payment of compensation in the alternative. It is open to the Court to award compensation in accordance with that section. The suit is primarily for the recovery of the deposit, and Art. 145 must apply to this case. The only case in which it has given rise to some difficulty is where money has been deposited. There are decisions now that the article is applicable only when the money is to be returned in

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specie. The plaint says that demands were made from the 20th March to the 8th May. If we take the latter date, the suit is not barred.

P. S. Sivaswami Aiyar for respondent :—Art. 145 applies only to the recovery of the specific property. That implies the existence of the property. If the property is lost or destroyed, it cannot be recovered in specie and the Article will have no application. Compensation may be asked for in the alternative. But the Article that will be applicable, so far as the right to that relief is concerned, will not be 145, but some other article, 49, for instance.

(*Benson*, J. Then your contention is that when the bailor brings a suit to recover the property in the twentieth year, you may say that the property was lost ten years previously and that the suit to recover its value is barred)?

If he then for the first time comes to know of the loss of the article, his suit for compensation can be brought within three years of that date. The bailee is in duty bound to give him notice of the loss of the article. If he did not do that duty and fraudulently kept the bailor in ignorance of the loss, the bailor will have three years from the date of the discovery of the fraud within which to sue. On the other hand, if the article was lost in the first year and the bailor knew of it immediately, it would be unfair to allow him to bring a suit after the lapse of 28 years and call upon the bailee to prove the circumstances under which the loss occurred to him.

Reference was made to the forms of decree in the Civil Procedure Code. It is singular that the form is framed exactly in the words of Art. 49. But all these difficulties do not arise in the case. The plaintiff himself admits demand and refusal. From that date the cause of action arose and he ought to have sued within the period provided by the Act. That the cause of action arises on demand and refusal is clear from the English authorities. See Story on Bailments, S. 107 and S. 122; Darby and Bosanquet, pp. 43, 44; Wharton's Law Lexicon "Detinue." See also Addison on Torts. Limitation runs from the date of demand and refusal. See *Wilkinson* v. *Verity*, L. R., 6 C. P., 206, and *Mitler* v. *Dell* [1891] I. Q. B. 468.

(*Benson*, J. The English Law of limitation does not apply to India). I am not quoting the authorities for the purpose of limitation. The question when the cause of action arises is one on which we can guide ourselves by English Law, seeing especially that India has got no law of Torts for itself. Since according to the authorities above cited a cause of action arose on demand and refusal, the suit is barred under Art. 49 of

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the Limitation Act, as it was not brought within three years from that date. Reference may be made to *Subbakka* v. *Maruppakkala*, I. L. R., 15 M. 157, in which it was held that demand and refusal turned possession which was originally rightful into a wrongful one, and that a suit for the recovery of the deeds would be barred, if not brought within three years of that date.

V. B. in reply :—The English cases quoted have no application to the case. There is no section in the English Law corresponding to Art. 145. If there were, much of the arguments for the respondent will have great force. According to the Limitation Act here time does not always run from the date of the cause of action. Art. 145 provides that limitation should run from the date of the deposit and not from the date of any cause of action that may subsequently arise. The period provided is thirty years. This is the Article applicable to a case of recovery of property given to the defendant under a *contract* of bailment. Arts. 47, 48, 49, &c., apply only to pure torts. Art. 49 applies to conversion, detinue, &c., *independent of contract*. If, for example, a person takes possession of a watch found by the roadside, he comes into possession rightfully. If subsequently his possession becomes unlawful, Art. 49 will apply to such a case of detinue, because it is independent of contract. Art. 145 comes under the category of breach of contract known to the English Law. The earlier Articles apply to cases where there is no contract even in inception. The distinction is well-known to English Law. In cases of contract, the cause of action begins with demand and refusal. In torts on the other hand, time runs from the date of the tortious act, independently of demand. See Clark and Lindsell on Torts, pp. 183, 184.

(*Benson*, J. What is your answer to the argument that Art. 145 is only the outside limit and that under certain circumstances such as demand and refusal, shorter periods will apply ?)

The answer is this. Let us take the case of a mortgagee setting up absolute title to the property to the knowledge of the mortgagor. Will the period of sixty years be shortened by reason of the title set up.

(*Chief Justice*. Why can he not sue for a declaration ?)

He may. But if he does not, the period of limitation will not be shortened. As for the I.L.R., 15 M., 157, it is a case of mortgage by deposit and has no analogy to this case. There was nothing in that case to make Art. 145 applicable. These questions do not arise in this case. There was no such demand and refusal as will make the defendant's possession wrongful. The right course to adopt is to reverse the decision of the lower Court on the question of limitation and remand the case for

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trial on the merits. The defendants may plead that the jewels were lost in spite of their careful keeping. The onus will be upon them to make out such a plea. If the defendant proves that notwithstanding his care and prudence, the jewels were lost in the dacoity, he will not be liable to make good the loss.

The Court delivered the following

JUDGMENT :—It is argued for the appellant that the District Judge has misunderstood the frame of the suit and has treated it as one for compensation for the wrongful act of the defendant in detaining the jewels, whereby they were stolen and loss accrued to the plaintiff, instead of treating it as a suit (as it really was) for the return of the specific jewels deposited, or if defendant could not return them, for the value of the same. It is urged by the appellant that the article of Schedule 2 of the Limitation Act properly applicable is not Art. 49, as held by the District Judge, but Art. 145.

In the first argument before us and apparently by the lower Court, it was assumed that the plaintiff demanded and was refused, the return of the jewels on the 20th March 1894, and on several other occasions during the two following months. If that assumption were correct, then we are of opinion that whichever view might be taken of the frame of the suit, it would be barred by Art. 49, for the demand and the refusal would have given plaintiff a cause of action to sue for the jewels and the cause of action having accrued, time would have begun to run against the plaintiff under Art. 49. The defendant's possession would have been unlawful from the time that he wrongfully detained the jewels after demand made, and the plaintiff should have brought his suit within three years from that date, whether it was for the return of the jewels, or for their value, or for compensation for their unlawful detainer. As it was not brought until the 23rd April 1897, it would clearly be barred by Art. 49. It is, however, contended by the appellant that Art. 145 allows a suit by a depositor, for the recovery of the property deposited, at any time within thirty years, and that Art. 49 cannot cut down this right. This argument seems to proceed on a misconception. The Limitation Act does not give the right to bring suits. It only imposes limitations on such right. The right to sue is founded either on the contract between the parties, *viz.*, that the defendant would

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return the jewels on demand, or on the tort constituted by the defendant's conversion of the jewels, which 'conversion' is evidenced by the demand and refusal. In both cases, the right to sue arises on demand and refusal. Thus whether the suit be viewed as one founded on contract or on tort, it would be barred if not brought within three years of the defendant's refusal to deliver up the jewels according to his contract with plaintiff. Art. 145 cannot operate to extend the time. It merely provides generally that a suit by a depositor for the recovery of property must be brought within thirty years from the date of the deposit. It imposes a limit on all such suits, even when there is no demand and refusal, but it does not operate to extend the period limited by other articles when there is a demand and refusal. These periods are unaffected by Art. 145. The conclusion that we have arrived at on this point is in harmony with the decision in *Subakka* v. *Marppakala*, I. L. R., 15 M., 157, where it was held that a suit for the return of title-deeds, lawfully held by the defendant in the first instance, was governed by Art. 49 and must be brought within three years from the date of the plaintiff's demand and defendant's unlawful refusal to deliver them up.

We are, however, of opinion that the assumption that there was a demand and refusal on the 20th March 1894 is not warranted by the pleadings. No evidence as to any demand and refusal was recorded, and when we called the attention of the pleaders before us to the terms of the pleadings, they stated that there was no evidence or admission to modify the conclusion that might be formed as to the contention of the parties on the pleadings. It is admitted by the defendant that there was a demand for the return of the jewels in March 1894, but he distinctly denies that he then, or at any time until May, when he says that the jewels were stolen, refused to deliver them up. He says he asked the plaintiff to get the orders of the Sub-Magistrate and a list prepared by him; and that plaintiff agreed to do this, but failed to do so.

That being the defendant's case, we cannot say that the suit is time-barred, unless the bar appears unequivocally on the face of the plaint. We do not think that it does so appear. The plaint merely states that the defendant "gave evasive replies" to the plaintiff's demand "saying that the Sub-Magistrate of Wandiwash directed

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him not to return the said jewels to the plaintiff without his (Sub-Magistrate's) order." We do not find any allegation in the plaint of such a refusal as would have caused time to run against the plaintiff. No doubt the plaintiff alleges that the cause of action accrued "on the several days of demand from the 20th March to 8th May," but he also alleges that it accrued in February 1894, when the jewels were deposited. These allegations are incorrect, for the cause of action would only accrue on a refusal to give up the jewels. We do not find any such refusal distinctly alleged by the plaintiff, and it is altogether denied by the defendant.

We must, therefore, set aside the decree, dismissing the suit on this preliminary question, and remand the suit for decision on the merits. Costs in this appeal will be costs in the suit.

But if he fails to make out his case, the plaintiff will be entitled to recover the jewels or their value as compensation for their loss.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Moore.

Ramaswami Aiyar ... ... Appellant * (*Plaintiff*)

v.

Kanthayyan and others ... ... Respondents (*Defendants*).

Ramaswami Aiyar v. Kanthayyan.

Agency—Misrepresentation—Principal's liability—Action "for money had and received".

An agent's misrepresentation does not estop the principal unless it was within the scope of the agent's authority to make such representation.

Where a person who was entitled to certain periodical payments from the Government did not register his name in the Collector's Register and [redacted] who was a *bona-fide* purchaser for value from the previous owner, so entered his name and was in receipt of those payments:—

Held, that the real owner could not maintain against the latter a suit for the arrears as "for money had and received."

Second appeal from the decree of District Court of Salem in A. S. No. 64 of 1895, reversing the decree of the Court of the District Munsif of Salem in O. S. No. 734 of 1893.

The plaint property belonged to the father of defendants 1 and 2 and was mortgaged by him to the plaintiff's brother on the 12th December, 1868. The plaintiff's brothers, and subsequently his mother, were in receipt of the jari amount in lieu of interest.

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* S. A. No. 1049 of 1897. 26th October 1898.

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After the death of his mother in 1882, he became entitled to receive the jari amount, and did receive it for some years. Since, however, he was employed for some time elsewhere, he permitted the 1st defendant to receive the money for him. The 1st and 2nd defendants, however, mortgaged and subsequently sold the lands to the 3rd and 4th defendants. When, after his retirement from service, he applied to the Tahsildar for the payment of the jari amount to him, he referred the plaintiff to the District Gazette in which notice of the sale to the 3rd and the 4th defendants had been given, calling on all who had objections to the payment of the amount to them, to state them within three months from the date thereof. The plaintiff asked the defendants 3 and 4 not to interfere with his right as mortgagee to receive the jari amount in lieu of interest and for a refund of the money wrongfully received by them. The defendants not having taken any notice of the demand, this suit was brought by the plaintiff for the establishment of his right to receive the amounts from the Government and for the recovery from defendants 3 and 4 of Rs. 75 wrongfully received by them for faslis 1297, 1298, and 1299.

The 4th defendant, who was the only contending defendant, pleaded that the mortgage was not genuine, that the lands were mortgaged to him in 1884 and sold in 1889, that he purchased the lands in ignorance of the mortgage, and that the suit was barred by limitation. The District Munsif found all the issues in plaintiff's favour and gave him a decree. On appeal it was contended that the suit was barred under the provisions of the Pensions Act, and that the suit could not be decided without the Collector being a party on the record. The District Judge overruled both these contentions, but reversed the decree of the lower Court on the ground that the plaintiff's agent was instrumental in bringing about the mortgage to the father of defendants 3 and 4, that the 3rd and 4th defendants took a sale of the lands in ignorance of the plaintiff's rights and that to give a decree to the plaintiff as against such innocent purchasers would be to enable him to take advantage of his agent's fraud. Against this the plaintiff appealed.

C. Ramachandra Rao Saheb and *S. Kasturi Ranga Aiyangar* for appellant.

P. R. Sundara Aiyar for 4th respondent.

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The Court delivered the following

JUDGMENTS :—*Subrahmania Aiyar, J.*—I agree with the lower appellate Court that there was an enfranchisement. No objection to the suit can, therefore, be raised under the Pensions Act XXIII of 1871 against the maintainability of the suit. I also think that the lower Courts were right in holding that the suit in so far as it is sustainable against the respondents is not barred by limitation. The right in question is manifestly a periodically recurring right. (See *Ramnad Zamindar v. Dorasami*, I. L. R., 7 M. 341, and *Raoji* v. *Bala, Ib.* 15 B. 135); and, as the plaintiff was not refused enjoyment of the right for more than 12 years before the institution of the suit, the plaintiff is not precluded from obtaining a decree establishing the right. But I think the lower appellate Court erred in holding that the plaintiff was estopped from relying on his mortgage. Assuming for argument that the father of the defendants 3 and 4 was led to make the purchase relied on by them in consequence of Anantharama Aiyar's alleged misrepresentation that the right to the periodical payment was not subject to any incumbrance, the plaintiff cannot be held to be affected thereby, since Anantharama Aiyar had been empowered by the plaintiff only to receive from the Collector's office the money due to him from time to time. The alleged misrepresentation could not be taken to refer to anything within the scope of Anantharama Aiyar's agency as aforesaid. The plaintiff is, therefore, entitled to a decree, establishing his right to receive the amount payable by the Collector so long as the mortgage held by him is undischarged and in force. The remaining question is whether the plaintiff is entitled to a decree against the 3rd and 4th defendants for the Rs. 75 received by them from the Collector for faslis 1297, 1298 and 1299.

I think that he is not entitled. Though, no doubt, according to the findings now arrived at the plaintiff has, as against the said defendants, a better title to the money as the holder of the mortgage prior in date to the sale to the father of the defendants 3 and 4, yet it cannot be said that the receipt by them was for the plaintiff. The amount was not paid to them to quote the words used in *Attorney-General* v. *Perry* (2 Comyns at 490) "without any reason, authority or consideration." Moreover, the plaintiff was not registered on the records of the Collector as the person entitled to receive

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the moneys payable by him periodically. The defendants 3 and 4, however, were so registered and the payment by the Collector, as well as the receipt by the defendants 3 and 4, were *bona fide* and without notice of the plaintiff's preferential right (compare *Kendall v. Wood*, L. R. 6 Ex. ch. 243.) Under these circumstances the 3rd and 4th defendants cannot be held liable for the amount in question as money had and received. The decree of the lower appellate Court will, therefore, be modified by declaring that the plaintiff is entitled to receive the amount payable by the Collector from time to time until the plaintiff's mortgage is paid up.

The respondents will pay the appellant's costs in this and in the lower appellate Court.

Moore, J.—I concur.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Shephard and Mr. Justice Boddam.

Sellathamall ... ... Appellant * (*Defendant*)

v.

Oliver ... ... Respondent (*Plaintiff*).

Sellathamall *v.* Oliver.

Civil Procedure Code, S. 13—*Res judicata*—*Ex-parte* decree, finality of.

An *ex-parte* decision is not final within the meaning of S. 13 of the Code of Civil Procedure and cannot act as *res judicata*.

Nilmoney Singh v. *Heera Lall Dass*, I. L. R., 7 C. 23, and *Bhugirath Patoni* v. *Lochun Deo*, 10. C. 275, approved and followed.

Second appeal from the decision of the District Judge of Tanjore in A. S. No. 866 of 1897, reversing the decree of the Sub-Collector of Tanjore in O. S. No. 24 of 1897 under Act VIII of 1865.

This is a suit under S. 9 of the Rent Recovery Act to enforce the acceptance of patta. Two issues were framed in the case—1. Is the defendant entitled to an Amani patta? 2. Is the extent of land entered in the patta correct? The latter issue was found in favour of the plaintiff. As to the former issue, there was, in fact, no evidence in the case. The kurnam, who was the only witness called, stated that he prepared the patta from the jamabundi accounts.

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* S. A. No. 542 of 1898. 19th January 1899.

He deposed nothing as to the previous custom, whether an Izara patta or an Amani patta was usually tendered in the village. The plaintiff, however, relied on the decision in a previous suit for the acceptance of patta before the Deputy Collector of Pattukotta, as barring this suit. The Sub-Collector who tried the case overruled this contention on the ground that that decision was *ex-parte* and could not act as *res judicata*. The District Judge on appeal held that the patta in the case being the same as that in the previous suit, all the objections now taken against the patta must be considered to have been taken in the previous suit and finally heard and disposed of against the defendant and that the *ex-parte* decision might and did operate as *res judicata*. He, therefore, ordered the defendant to accept the patta as tendered. Against this order the defendant appealed. Sellathamall v. Oliver.

K. Srinivasa Aiyangar for appellant.

V. Krishnaswami Aiyar for respondent.

The Court delivered the following

JUDGMENT :—Following the decision in *Nilmoney Singh* v. *Heera Lall Dass*, I L. R., 7 C. 23, and *Bhugirath Patoni* v. *Lochun Deb, Ib.* 8 C. 275, which we see no reason to think wrong, we hold that the *ex-parte* judgment is not a final decision within he meaning of S. 13 of the Civil Procedure Code. The point was neither argued, nor decided in *Latchanna* v. *Saravayya*, I. L. R, 18 M. 164. Apart from that point, we doubt whether the judgment makes the matter now in dispute *res judicata*.

We must reverse the judgment of the lower appellate Court and restore that of the Sub-Collector.

The respondents must pay costs in this and in the lower appellate Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Shephard and Mr. Justice Boddam.

Sidney Smith ... ... Appellant* (*Plaintiff*)

v.

Coelho and others ... ... Respondents (*Defendants*).

Sidney Smith *v.* Coelho.

Suit—Foreign judgment—When suits upon judgment allowable.

A suit upon a foreign judgment will not lie unless it is for an ascertained sum of money.

Sadler v. *Robinson* (2 Camp. 253) followed.

Appeal from the decree of the District Court of S. Canara in O. S. No. 82 of 1897.

In 1879 one B. A. Brito of Mangalore, planter, deposited the title-deeds of his coffee estates in Mysore by way of equitable mortgage as security for moneys advanced to him by the plaintiff. The terms of this mortgage were subsequently embodied in an instrument, dated 11th July 1882. The said B. A. Brito mortgaged the crop of some of the estates to Messrs. Morgan and Sons of Mangalore, and otherwise acted in contravention of the provisions of the mortgage to the plaintiff, whereupon the plaintiff filed a suit (No. 12 of 1890) on the 12th February 1890, in the District Court of Shimoga in the Province of Mysore. Subsequently, the parties entered into a razinama by which the defendant B. A. Brito consented to a foreclosure decree in favour of the plaintiff and agreed to give up his right to "*the crop of* 1890 *and* 1891," and the plaintiff in return promised to give up his right to two of the estates and promised to pay Rs. 1,50,000 to one M. M. Coelho; and a decree was passed by the Court in terms of this razinama. On the 26th June 1894, the plaintiff presented a petition in execution of the decree in suit No. 12 of 1890, asking the Court to call upon the defendant to render an account of the crop of two of the estates for 1890. The Court of Shimoga and the Chief Court of Mysore on appeal dismissed this petition as they were of opinion that the crop gathered in 1890 was not given to the plaintiff by the razinama decree. The plaintiff brought this suit in the District Court of South Canara against the executrix and executor of the said B. A. Brito (his wife and son) for an account of the crop gathered in 1890 and for the

* A. No. 113 of 1898. 30th January 1899.

recovery of the price of what may be found due, together with interest at nine per cent. per annum. The suit is expressly mentioned as brought on the decree in suit No. 12 of 1890 in the Court of Shimoga, and the cause of action is dated the 2nd of July 1891, the date of that decree. Sidney Smith v. Coelho.

The defendants, *inter alia*, contended that the decree gave him only the crop of 1891, that the question had been raised and finally decided in execution by the Mysore Courts, that the question was one for the executing Court under S. 244, Civil Procedure Code, and could not be made the subject of a separate suit and that the suit was barred by limitation. The District Judge taking all the circumstances of the case came to the conclusion that by the words "the crop of 1890 and 1891", the parties did not understand that the crop of 1889-90 was to go to the plaintiff. He, however, dismissed the suit on the ground that the question could not be raised in a regular suit (S. 244, C. P. C.), and that the question was *res judicata* by reason of the order in execution of the Mysore Courts. From this the plaintiff appealed to the High Court.

K. Brown, R. A. Nelson and *K. Narayana Row* for appellant.

C. R. Pattabhiramaiyar and *K. P. Madhava Row* for 4th respondent.

K. N. Aiya for 3rd respondent.

S. Srinivasa Aiyangar for 1st and 2nd respondents.

The Court delivered the following

JUDGMENT :—The action purports to be brought on a foreign judgment. The judgment on which the plaintiff proceeds is not a judgment for an ascertained sum of money and, therefore, affords no foundation for an action (*Sadler* v. *Robinson*, 1 Camp. 253).

The appeal must be dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Arthur Collins, *Kt.*, Chief Justice, and Mr. Justice Benson.

Sinia Pillai ... ... Appellant* (*Defendant*)

v.

Munisami Aiyar and others ... ... Respondents (*Plaintiffs*).

Sinia Pillai *v.* Munisami Aiyar.

Guardian and Wards Act, Ss. 29 and 30—Mortgage of minor's estate—Voidability of mortgage.

A mortgage of a minor's property executed by a guardian without the sanction of the court is not void, but only voidable.

Where a guardian mortgaged a minor's property for the purpose of clearing off antecedent debts binding on the minor's estate, and the minor wished to avoid the mortgage:

Held: that he could not avoid the mortgage without restoring to the mortgagee the benefit that he had received thereunder.

Appeal from the decree of the Subordinate Judge's Court of Madura (West) in O. S. No. 6 of 1898.

The facts appear from the judgment.

P. S. Sivaswami Aiyar for appellant.

V. Krishnaswami Aiyar for *V. Bhashyam Aiyangar* for respondent.

The Court delivered the following

JUDGMENT:—The plaintiff sued for the principal and the balance of interest due on a simple mortgage of minor's—defendant's—property. The mortgage was executed by the guardians of the defendant appointed under the Guardian and Wards Act (VIII of 1890), but the guardians failed to obtain the sanction of the Court as required by S. 29 of the Act. The mortgage was executed to enable the guardians to discharge debts incurred by the minor's late father, which debts were admittedly binding on the minor's estate. There was urgent necessity to borrow the money as the creditors were pressing simultaneously and would have filed suits and forced a sale of the property. The terms of the mortgage were fair and the money was actually applied for the benefit of the

* A. No. 144 of 1898. 17th January 1899.

minor's estate. All this is admitted before us, but the minor defendant by another guardian specially appointed *ad litem* pleaded that the mortgage not having been sanctioned by the Court was void and incapable of being enforced. The Subordinate Judge decreed for the plaintiff, and the defendant now appeals. Sinia Pilla v. Munisam Aiyar.

We have, no doubt, but that the decree of the Subordinate Judge is right. The mortgage executed by the guardian without sanction is not void. It is only voidable. This is clear from S. 30 of the Act, which must be read with S. 29.

The minor defendant through his guardian *ad litem* desires to avoid the mortgage. He is entitled to do so, but only on condition that he shall restore any benefit which he received thereunder to the person from whom it was received. This principle is acknowledged in S. 64 of the Indian Contract Act, in S. 35 of the Transfer of Property Act, and generally by the Indian Courts as Courts of Equity and good conscience. (*Shurrut Chunder* v. *Rajkissen Mookerjee*, 15 B.L.R., 350; *Girraj Bakhsh* v. *Kazi Hamid Ali*, I.L.R., 9 A., 340; *Raj Lakhi Ghose* v. *Debendra Chundra Mojumdar*, I. L. R., 24 C., 668). The fact that the person who has received the benefit is the defendant does not, in our opinion, make any difference, for the mortgage is *primâ facie* one binding on his estate, and he, in effect, says: "set it aside on the technical ground that it was not sanctioned by the Court."

The minor defendant cannot, of course, be made personally liable for the debt (*Waghela Rajsanji* v. *Shekh Masludin*, I. L. R., 11 B., 551), but the mortgaged property and his estate generally are made liable by the terms of the instrument of mortgage, and this is all that the decree of the Subordinate Judge also makes liable.

We, therefore, confirm the decree and dismiss this appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Davies and Mr. Justice Moore.

Venkatakrishna Rao and another ... Appellants* (*Plaintiffs*)

v.

Venkata Jagga Rao and others ... Respondents (*Defendants*).

Venkatakrishna Rao. *v.* Venkata Jagga Rao.

Madras Act I of 1876—Partition—Alienation.

Partition among the members of a family is not an alienation *inter se.*

Appeal from the decree of the District Court of Ganjam in C. S. No. 30 of 1895.

The plaintiffs and defendants are members of a family owning a permanently-settled estate, named Danta Hunda. On a family partition two villages fell to the share of the plaintiffs, and this suit by them is for the separate registry and assessment of the two villages in their name, under the provisions of the Madras Act I of 1876. The defendants pleaded that the peishcush had been divided between them with reference to the good and bad nature of the lands which each set of sharers took, that their arrangement could not now be disturbed by the Court, and that the suit was unsustainable under Act I of 1876. The District Judge held that the Madras Act I of 1876 was applicable only to the case of *alienations* of permanently-settled estates, and that partition was not an alienation within the meaning of the Act, and dismissed the suit as unsustainable under the Act. The plaintiffs appealed.

C. R. Pattabhirama Aiyar for appellants.

John Adam for 2nd and 3rd respondents.

V. Bhashyam Aiyangar and *C. R. Tiruvenkatachariar* for 1st, 4th and 5th respondents.

The Court delivered the following

JUDGMENT:—We agree with the Judge that the partition of an estate between members of a Hindu family does not constitute an alienation of any part of that estate. There is, no doubt, a mutual transfer of interest between the members of the family, but such transfer cannot amount to an alienation, because the estate itself is left intact.

We must, therefore, dismiss the appeal with costs.

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* A. No. 210 of 1897. 25th August 1898.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Present at the hearing of the First Appeal:—Lord Hobhouse, Lord Macnaghten and Sir Richard Couch.

Present at the hearing of the Second Appeal:—Lord Herschell, Lord Watson, Lord Hobhouse, Lord Macnaghten and Sir Richard Couch.

1st Appeal.

Sri Balusu Gurulingaswami ... Appellant*

Sri Balusu Ramalakshmamma ... Respondent.

2nd Appeal.

Radha Mohun ... Appellant,

v.

Hadai Bibi and another ... Respondents.

Sri Balusu Gurulinga-swami *v* Sri Balusu Ramalakshmamma. — Radha Mohun *v.* Hadai Bibi.

Hindu Law—Adoption—Adoption of an only son, validity of.

The adoption of an only son is valid according to the Hindu Law. And in the absence of any express prohibition by the husband the widow can validly adopt an only son.

1st Appeal.

J. D. Mayne for appellant.

J. H. A. Branson and *A. Phillips* for respondents.

2nd Appeal.

C. W. Arathoon for appellant.

Mayne and *G. E. A. Ross* for respondent.

The facts appear from the judgments.

Lord Hobhouse:—The first of these two cases, which comes from Madras, was argued in February 1898, but the judgment was postponed for the hearing of the second which comes from Allahabad. The reason was that each case raises a question of general importance on which different views have been taken by different High Courts, and it was agreed on all hands to be advantageous that the two litigations should be under consideration at the same

* March 1899.

Sri Balasu Gurulingaswami v. Sri Balusu Ramalakshmamma.

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time. The Allahabad Appeal was argued in the month of July last, and their Lordships are now prepared to state their opinions on both cases.

In the Madras case, the plaintiff sued as one in the line of succession to the last owner of an estate who had died without issue. The principal defendant was a boy who had been adopted by the last owner's widow with the consent of the family Gnatis or Sapindas. The plaintiff claimed a declaration that the adoption was invalid. His main ground was that the adopted boy was the only son of his father. The defendants showed that the natural father of the boy authorised his widow to give him in adoption in the way which was actually effected between the two widows, and that the plaintiff himself in his character of Sapinda was a party to the transaction. In addition to asserting the legal validity of the adoption, they pleaded that the plaintiff was estopped by his concurrence in it.

The District Judge gave no opinion on the point of estoppel. He found that the law in Madras was settled, and he gave judgment in the following terms:—

"The case illustrates how the people of this Presidency have "settled down under the law as enunciated by the Madras "High Court so long ago as 1862, and re-affirmed in 1887, and "it is impossible to say how many adoptions of only sons may "have been made during the last thirty years on the faith of "such enunciation of the law, and what innumerable rights "might be disturbed by any contrary decision after such a lapse "of time."

The case was heard on appeal before the late Judge Sir *T. Muttusami Aiyar* and Mr. Justice *Shephard* who affirmed the decree below. The learned Judges did not express any original opinion of their own on the main question. They thought that there was no estoppel, because at the date of the adoption nobody thought of its being illegal. As to its legal validity they found that all the Madras decisions had been in its favour and that the Madras Courts were right in following an unbroken current of authority in that Presidency, notwithstanding differences of view in other Courts.

At this Bar two points have been taken: first, that the gift or reception of an only son in adoption is invalid in law; and, secondly, that, if not invalid when the boy is received by the adoptive father or given by the natural father, it is so improper that in the absence of express authority given by a husband his widow has no power to effect it.

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In the Allahabad appeal it is not necessary to make any statement of facts, because the decree appealed from depends entirely on the answer given to a question referred by a Division Bench of the High Court to a Full Bench. That question is as follows:—

"The adoption of an only son having taken place in fact, is "such adoption null and void under the Hindu law?" That abstract question is the only one raised in the case lodged by the appellant and the only one argued at this Bar. The High Court answered it in the negative. Mr. Arathoon has contended in a learned argument that it ought to be answered in the affirmative.

As regards the second question raised in the Madras case, which is peculiar to that case, their Lordships feel no difficulty. The only authority for the argument of the appellants is the opinion of the late Sir *Michael Westropp* delivered in the case of *Lakshmappa* v. *Ramava* which was decided in the High Court of Bombay in the year 1875 and a report of which was after long delay inserted in the 12 B. H. C. R., page 364. That learned Judge held that, assuming that a man's only son may be given in adoption by himself, yet if he has not expressly given to his widow an authority to make such a gift it cannot be implied by law. Now the authority of a widow to give or take in adoption differs in different schools of Hindu law. Their Lordships are not re-trying this Bombay decision. In Madras it is established, as the learned Judge *Muttusami Ayyar* shows, that, unless there is some express prohibition by the husband, the wife's power, at least with concurrence of Sapindas in cases when that is required, is co-extensive with that of the husband. That is certainly the simplest rule, and it seems to their Lordships most consistent with principle. The distinction taken by *Westropp, C.J.*, appears to have been quite novel, and also at variance with a decision by his predecessor, Sir Michael Sausse. There may be

Sri Balusu Guru Ingaswami v. Sri Balusu Ramalakshmamma. — Radha Mohun v. Hadai Bibi.

some peculiarity in the school of law which prevails in Bombay to support it, though it has not been brought to their Lordship's notice; but if there is any such, it does not apply to these parties in Madras. On this point therefore their Lordships agree with the learned Judges below.

What remains to them is the difficult task of deciding the more general question which is common to both the appeals. The difficulty which first meets the eye is the variety of judicial opinions and of opinions in treatises, which during the last quarter of a century have been gathering into definite opposite channels in the different areas of jurisdiction. There are also other difficulties beyond. Many of the judicial decisions relied upon are embodied in imperfect reports, or in mere notes of points. The question is complicated by the use of different modes of adoption not always clearly specified, and by the intrusion of special local or tribal customs. And the original authorities on which all the conflicting opinions alike are based are written in Sanskrit, which for many centuries has been a dead language known only to a few learned people, which hardly any of those who have been called to judgment have understood, the translations of which are more or less disputed, and of which it is averred, probably with truth, that its exact phases of meaning cannot be caught except by those who have studied closely and as a whole the language and the works of the particular writer under consideration. Their Lordships have, however, one advantage over their predecessors in these inquiries. The greater attention paid of late years to the study of Sanskrit has brought with it more translations of the sacred Hindu books, and closer examinations of texts previously translated. And in the Allahabad case especially, the appellants' side was argued in the High Court by Mr. Banerjee who is stated by the Court to be familiar with Sanskrit, and it is the subject of a very elaborate judgment by Mr. Justice *Knox* who is a student of Sanskrit and as he tells us has paid special attention to the books of Manu and Vasishtha. Perhaps the most convenient course will be to set out the more important texts which have been brought into discussion, then to see how they have been treated by recent commentators and by judicial decisions, stating finally the conclusions to which their Lordships have with these aids been brought.

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The most revered of all the rishis or sages is Manu, who, though he says nothing specific on the point now in issue, is referred to as favouring one side or the other. The passages cited are as follows. They are in Cap. IX:—

"By the eldest son as soon as born a man becomes the father "of male issue, and discharges his debt to his pitris or progenitors. "That son alone by whose birth he discharges his debt to his "forefathers and through whom he attains immortality was begot-"ten from a sense of duty." He adds sentences to affirm the powers, privileges and duties of the first-born, and his great importance in the family. *VV.* 106–109.

"By a son a man obtains victory over people, by a son's "son he attains immortality, then by the son of that son he reaches "the region of Brahma." *V.* 137.

"Since the son delivers the father from the region called Put "he was therefore called Putra by Brahma himself." *V.* 138.

"Whom the motheror the father give with water a son in "distress similar endowed with affection he is to be deemed a "datrima, one brought forth."

In the three last quotations their Lordships have followed the words of Mr. Justice *Knox* who says that he has attempted to follow the text word by word without interpolating or taking away any particle, and that on that account his style is rough. (*See Record, pp.* 247, 248, *and Golap Chandra, Treatise on Adoption, p.* 282.)

Near to Manu in point of antiquity and of authority comes Vasishtha, around whose utterance on the point in issue the greater part of subsequent comments has clustered. His writings have been translated by Dr. Bühler and published in the work entitled "Sacred Books of the East", which has been edited by Professor Max Müller. The passage in that translation is as follows, Ch. XV.:—

(1.) Man formed of uterine blood and virile seed proceeds from his mother and his father as an effect from its cause.

(2.) Therefore the father and the mother have power to give, to sell, and to abandon their son.

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(3.) But let him not give or receive in adoption an only son.

(4.) For he must remain to continue the line of ancestors.

(5.) Let a woman neither give nor receive a son except with her husband's permission.

On page 249 of the Record Mr. Justice *Knox* gives his own translation which does not appear to differ substantially, though it does slightly in form, from that of Dr. Bühler.

Another ancient sage is Saunaka, of whom a text is quoted in the Dattaka Mimamsa of Nunda Pandita as follows:—

Section IV., Para. 1. "In reply to the question as to the qualification of the person to be affiliated Saunaka declares: 'By no man having an only son (eka putra) is the gift of a son to be ever made; by a man having several sons (bahu putra) such gift is to be made on account of difficulty (prayatnatas).'"

Next in time is Yajnavalkya whose writings with comments by Vijnanesvara constitute the Mitakshara, a work of very high authority all over India. The material passages are as follows in Mr. Colebrooke's translation, Ch. 1, Sec. XI.:—

Para. 9. "So Manu declares 'He is called a son given (datrima) whom his father or mother affectionately gives as a son being alike [by class] and in a time of distress confirming the gift with water.'"

Para. 10. "By specifying distress it is intimated that the son should not be given unless there be distress. This prohibition regards the giver [not the taker]."

Para. 11. "For an only son must not be given [nor accepted] for Vasishtha ordains 'Let no man give or accept an only son.'"

Para. 12. "Nor though a numerous progeny exist should an eldest son be given, for he chiefly fulfils the office of a son as is shown by the following text 'By the eldest son as soon as born a man becomes the father of male issue.'"

The abovementioned writings are all classed among the Smritis, which are held by orthodox Hindus to have emanated from the Deity, and to have been recorded, not like the Sruti in the very words uttered by that Being, but still in the language of inspired

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men. They contain precepts whose authority is beyond dispute, but whose meaning is open to various interpretations and has been and is the subject of much dispute, which must be determined by ordinary processes of reason. The Dattaka Mimansa stands on a different footing. It is not older than the 17th century A.D. and does not claim any but human origin. Indeed its translator, Mr. Sutherland, says that it is "As its name denotes an argumentative "treatise or disquisition on the subject of adoption; and though from "the author's extravagant affectation of logic the work is always "tedious, and his arguments often weak and superfluous, and "though the style is frequently obscure and not unrarely inaccu-"rate, it is on the whole compiled with ability and minute attention "to the subject, and seems not unworthy of the celebrity which it "has attained." Moreover it was written during Mahomedan rule and cannot be the work of a lawgiver or judge. The date of the Dattaka Chandrika is not certain, but it is at all events very much later than the Smritis and it stands only on the footing of a work by a learned man.

Messrs. West and Bühler, in their valuable work on Hindu Law (3rd Edition, page 11), speak thus: "The Dattaka Mimansa "and the Dattaka Chandrika, the latter less than the former, are "supplementary authorities on the Law of Adoption. Their opini-"ons however are not considered of so great importance but that "they may be set aside on general grounds in case they are opposed "to the doctrines of the Vyavahara Mayukha or the Dharmasin-"dhu and Nirnayasindhu." This is spoken with special reference to Bombay or Western India. But both works have had a high place in the estimation of Hindu lawyers in all parts of India, and having had the advantage of being translated into English at a comparatively early period, have increased their authority during the British rule. Their Lordships concur with Mr. Justice *Knox* in saying that their authority is open to examination, explanation, criticism, adoption or rejection like any scientific treatises on European jurisprudence. Such treatment would not allow for the effect which long acceptance of written opinions has upon social customs, and it would probably disturb recognised law and settled arrangements. But so far as saying that caution is required in accepting their glosses where they deviate from or add to the Smritis their Lordships are prepared to concur with the learned Judge.

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The passages in the Dattaka Mimamsa are as follows:—They are contained in Section IV, Para. 1 is that which gives the saying of Saunaka already quoted. Para. 2. "He, who has one "son only, is *eka-putra*, or one having an only son: by such a one "the gift of that son must not be made; for a text of Vasishtha "declares 'an only son let no man give, &c.'" Para. 6. The writer comments on the word 'ever' as used by Saunaka thus:—"In a time of calamity: accordingly, Narada says, 'a deposit, a son, "'and a wife, the whole estate of a man who has issue living, the "'sages have declared unalienable, even by a man oppressed by "'grievous calamities: although the property be solely that of the "'man himself.' This text also regards an only son, for it is decla-"ratory of the same import as the texts of Saunaka and Vasishtha." Para. 8. The writer comments on Saunaka's words "By no man "having an only son" thus:—"From this prohibition the gift by "one having two sons being inferrible, this part of the text ('By "'one having several sons,' &c.) is subjoined, to prohibit the same "by one having two sons also."

The Dattaka Chandrika (Section 1, para. 27) only repeats Vasishtha's saying, and couples it with the obligation to adopt a brother's son if there is one.

Their Lordships do not propose to spend much time in a close examination of the recent commentators. They have been very carefully sifted in the Indian Courts, and naturally so, seeing what was the paucity and obscurity of judicial authority until within the last thirty years or so. The principal effect which they have on the mind is to show the great variety and uncertainty of opinion on the question now in issue. The earliest of those referred to is Jagannatha, a learned Hindu lawyer employed by Sir W. Jones to compile a digest. He thought that the prohibition in the Smritis is only moral and not legal. That also is the opinion of the two latest writers, both deeply versed in the Sanskrit language, Mr. Mandlik who appears to have translated the texts of Saunaka, and Mr. Golap Chandra Sarkar who has written a treatise on adoption. Sir Thomas Strange, writing in the year 1830, expresses an opinion in the body of his treatise that the prohibition is monitory only, Vol. 1, page 87. On the other hand, the weighty opinions of Mr. Colebrooke, Sir Francis Macnaghten and Mr. Sutherland are

thrown into the scale; and that of Mr. Justice *Strange* is also cited to the same effect, and is supposed by some to express the latest opinions of his father, Sir *Thomas Strange*. But it may be observed that Sir Francis Macnaghten and Mr. Justice *Strange* found their opinion, and that the adoption of an eldest son is placed by Mr. Justice *Strange* on precisely the same footing as that of an only son, and is ranked by Sir *F. Macnaghten* as a heinous crime though not so heinous as the adoption of an only son. Their Lordships think that the authority of recent text writers must not be stated more favourably to the present appellants than is stated in the book of Messrs. West and Bühler. Expressing no opinion of their own, those learned writers say, "If he have but one son, the gift of "that one is everywhere reprobated as a grave spiritual crime. "By most the gift is thought invalid." Their Lordships turn now to the more solid ground of judicial decision.

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In Madras the course of decision has been very simple. In 1862 the High Court decided that the adoption of an only son, however sinful, was valid in law. It has been shown by Mr. *Mayne* that a previous decision then relied on was misapprehended by the learned Judges. But that was not the sole ground of their decision; they also relied on learned opinions and they agreed with those opinions. And the same High Court has since that time had the same question brought before it more than once—three times, it is stated in one of the judgments below. There has been no fluctuation in their decisions. It must be taken that the law in Madras has ever since been settled in favour of the present respondents.

In Allahabad also the condition of judicial decisions is simple. In 1879 the question was brought before a Full Bench of the High Court, consisting of Sir Robert Stuart and Sir Charles Turner, who were English barristers, and three eminent civilians, Justices *Pearson, Spankie* and *Oldfield* The Court decided in favour of the adoption, Sir C. Turner dissenting. In the year 1889 some doubts were expressed on the point by Justices *Straight* and *Mahmood*, and that circumstance, coupled with the delivery of adverse opinions by the High Courts of Calcutta and Bombay, led to the rather unusual course of referring the same question to a Full Bench, of which Mr. Justice *Mahmood* was one. The result has

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been an unanimous decision supported by judgments of the Chief Justice and Mr. Justice *Knox* which are remarkable for research and fulness of treatment.'

In Bengal there has been more fluctuation of opinion. The law was quite unsettled in the year 1868. It would be of little use now to examine the earlier decisions in the Sudder Dewani Adaulut and the Supreme Court. That has been done with great care by Sir William Markby in a case about to be mentioned. The first case which raised the exact question in the High Court was heard in the year 1868 before Justices *Dwarkanath Mitter* and *Louis Jackson*. The judgment was delivered by Mr. Justice Mitter. After quoting passages from the two abovementioned Dattaka treatises the learned Judge lays the law down thus: "The institution of adoption as it exists among the Hindus "is essentially a religious institution. It originated chiefly if not "wholly from motives of religion; and an act of adoption is to all "intents and purposes a religious act but one of such a nature that "its religious and temporal aspects are wholly inseparable. 'By "'a man destitute of male issue only' says Manu 'must the sub"'stitute for a son of some one description always be anxiously "'adopted for the sake of the funeral cake water and solemn rites.' "It is clear therefore that the subject of adoption is inseparable "from the Hindu religion itself and all distinction between religious "and legal injunctions must be inapplicable to it."

There is no doubt that this judgment has exercised very great influence on the controversy; and indeed if the learned Judge's fundamental position were sound there could be no controversy at all. Let us assume for this purpose, though it is matter of grave dispute, that the learned Judge is right in saying that adoptions originated in motives of religion and not in the ordinary human desire for perpetuation of family properties and names. Still the question is whether certain precepts have a legal or only a religious bearing. What is there in the subject matter of adoption which makes it clear that all precepts relating to it must bear a legal character? The learned Judge does not discuss that question. He begs it, merely stating that his own inference clearly follows from Manu's text. Their Lordships think that the doctrine propounded by him is equally opposed to a reasonable construction of

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the books apart from decision, and to decided cases. Indeed to show how far the doctrine is from being universally applicable it would not be necessary to go further than the passage which the learned Judge himself cites from Manu, though of course differences may be suggested between prohibitory and mandatory injunctions. Manu prescribes adoption on the score of religion. According to Mr. Justice *Mitter* this is necessarily a legal injunction, yet nothing is clearer than that there is no legal compulsion upon a Hindu to adopt a son, however irreligious it may be in him not to do it. There is not even any legal compulsion on his widow to do it when he is dead and cannot have a natural son. But the principle laid down is so important, goes so deep down to the root of these questions, and has exercised such influence, that their Lordships think it necessary to discuss it at length, for which this will be a convenient place.

Their Lordships had occasion in a late case to dwell upon the mixture of morality, religion and law in the Smritis. *Rao Balwant Singh* v. *Kishori*, 25 Ind. App., p. 69. They had to decide whether a prohibition on alienation of property away from a man's family, certainly based on religious grounds, had a purely religious or also a legal bearing. They then said:—"All these "old text books and commentaries are apt to mingle religious and "moral considerations not being positive laws, with rules intended "for positive laws. In the preface to his valuable work on Hindu "law Sir *William Macnaghten* says 'it by no means follows that "'because an act has been prohibited it should therefore be con- "'sidered as illegal. The distinction between the *vinculum juris* "'and the *vinculum pudoris* is not always discernible.'" They now add that the further study of the subject necessary for the decision of these appeals has still more impressed them with the necessity of great caution in interpreting books of mixed religion, morality and law, lest foreign lawyers accustomed to treat as law what they find in authoritative books, and to administer a fixed legal system, should too hastily take for strict law precepts which are meant to appeal to the moral sense, and should thus fetter individual judgments in private affairs, should introduce restrictions into Hindu society, and impart to it an inflexible rigidity, never contemplated by the original lawgivers.

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The late extension of the study of Sanskrit has apparently resulted not in weakening but in strengthening the cited opinion of Sir *William Macnaghten* Of course their Lordships do not presume to form any opinion on questions of Sanskrit grammar, but they observe that Mr. Golap Chandra, who is frequently referred to in the judgments below, contends as a matter of grammar that words (*e.g.*, those of Saunaka) which have been translated in the imperative form of command should take that of recommendation. Mr. *Mandlik* insists on the same view, and Mr. Justice *Knox* says that he originally took a contrary view but has been brought round by the authority of Mandlik and another Sanskrit scholar, Mr. Whitney.

Let us see now how Mr. Justice *Mitter's* principle accords with actual decisions. The controversy respecting eldest sons, whether or no they can be given in adoption, has a strong bearing on the present question. Manu attaches the highest importance to the character of an eldest son. The relevant passages from his Institutes have been quoted above.

No specific prohibition is contained in the passages, but the reasonable inference from them is given in the Mitakshara in Ch. 1, Sec. XI, para. 12, which has been already quoted. This express prohibition has been taken by some to be a legal rule, and has been enforced by modern writers of weight as before stated, and in legal decisions. It would certainly fall within Mr. Justice *Mitter's* principle. But it is quite abandoned, all over India as their Lordships understand; and the prohibition is held to be a matter for religious consideration only. It was the subject of careful examination and express decision by Justices *Markby* and *Romesh Chander Mitter* in the case of *Janokee Debea* v. *Gopaul Acharjea*, reported in 2 Cal., 365.

Again it is laid down that the giver of a son ought to have more than two sons. The text of Saunaka quoted above says that the gift is to be made by one having several sons (Bahu putra). The Dattaka Mimamsa, Sec. IV, 8, lays it down that the Sanskrit word signifies more than two, and that Saunaka's precept was introduced for the express purpose of excluding the inference that a man with two sons might give one in adoption. The Dattaka

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Chandrika, Sec. 1, 29 and 30, declares the same law. The precepts are precise, and yet their Lordships cannot find that anybody asserts them to be law in any but the religious sense.

Another precept is that a Hindu wishing to adopt a son should adopt the son of his whole brother in preference to any other person. That question came before this Board in the year 1878 in a case in which the Subordinate Judge had held the adoption to be invalid for violation of this precept; and the High Court were of a contrary opinion. This Board held that the terms of the precept were contained in both the Dattaka Mimamsa and the Dattaka Chandrika, and they are founded on the Mitakshara. Nevertheless they held that it is not a precept of law. They referred to the opinions of English text-writers to support them. No decision in point was cited and probably there is none in the books.

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One of the conditions for adoption laid down by Manu in the passage first quoted from him is that there must be distress. This is emphasised in the Mitakshara, Chap. 1, Sec. 11, para. 10, "The son shall not be given unless there be distress," which appears to mean that the giver must be in distress. "This prohibition," it continues, "regards the giver" and then occur the words "not the taker" apparently interpolated by the learned Benares lady who wrote under the name of Balam Bhatta. The Dattaka Mimamsa, Sec. IV, 20, says "No distress existing, the "giver commits a sin on account of the prohibition." If then the giver commits a sin the taker who enables him to do it cannot be free from sin; and if the commission of a sin makes the transaction void in law there can be no gift and consequently no adoption. And yet nobody contends for the legal force of this prohibition. It does not appear that in cases of adoption any inquiry is ever made about the distress of the natural father.

It is clear that the principle laid down so confidently by Mr. Justice *Mitter* as paramount in cases of adoption is repeatedly repudiated in practice; and in the Bengal case next to be cited the learned Judges while following the conclusion of their predecessors, dissociated themselves from the fundamental reason assigned for it.

Moreover this sweeping doctrine of Mr. Justice *Mitter* is not consistent with the prevalence of exceptional customs or

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other interference with the law. The extent to which the Smritis admit of special customs has not been argued in these cases and their Lordships cannot easily form any judicial opinion about it. But in a discussion about the sources of Hindu law by Doctor Jolly, published in 1883 (*see* p. 33), that learned Sanskrit scholar states grounds for holding that customs are only recognised by the Smritis when they do not contravene Divine laws.

Mr. Arathoon has impressed upon their Lordships more than once during this argument that the texts he relies on are held to emanate from the Divine Power. If then that Power has said that certain modes of adoption shall be null and void how can any human practices lawfully limit its operation? And yet the validity of local or tribal customs to adopt only sons is asserted by every jurist. In the Punjab such a custom is received as the general law of that large area, and it governs the relations of the eight millions or so of the Hindus (Jats, Brahmans, Rajputs, and others) who live there: and that, though the sources of their law are the same Smritis which are followed in other parts of India. The inference is that among numerous Hindu communities the prohibition of the Smritis on this point has not been received as invalidating the transaction.

Again if the religious and legal injunctions were co-extensive, it would place both Courts of justice and legislatures in a very delicate position when dealing with such matters. Suppose that in this Madras case the Court had upheld the plea of estoppel; it would have set up a judicial rule to bar the working of a Divine law. Suppose that the statutory six years had elapsed and that the suit had been barred by time; then the legislature would be interfering to bar the working of a Divine law. In each case a separation would have been made between those religious and temporal aspects which *Mitter,* J., declares to be wholly inseparable. Yet the British rulers of India have in few things been more careful than in avoiding interference with the religious tenets of the Indian peoples. They provide for the peace and stability of families by imposing limits on attempts to disturb the possession of property and the personal legal status of individuals. With the religious side of such matters they do not pretend to interfere. But the position is altered if the validity of temporal arrangements

on which temporal Courts are asked to decide is to be made subordinate to inquiries into religious beliefs.

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No system of law makes the province of legal obligation co-extensive with that of religious or moral obligation. A man may, in his conduct or in the disposition of his property, disregard the plainest dictates of duty. He may prefer an unworthy stranger to those who have the strongest natural claims upon him. He may be ungrateful, selfish, cruel, treacherous to those who have confided in him and whose affection for him have ruined them. And yet he may be within his legal rights. The Hindu sages doubtless saw this distinction as clearly as we do, and the precepts they have given for the guidance of life must be construed with reference to it. If a transaction is declared to be null and void in law, whether on a religious ground or another, it is so; and if its nullity is a necessary implication from a condemnation of it the law must be so declared. But the mere fact that a transaction is condemned in books like the Smritis does not necessarily prove it to be void. It raises the question what kind of condemnation is meant.

It is true that the learned Judges *Mitter* and *Jackson* refer to the texts of the Dattaka Mimamsa and Chandrika. But according to the paramount principle laid down by them those texts could only be read in one way. That principle is in fact the sole ground of the decision, and as it cannot be admitted the decision is deprived of weight.

The next case in Bengal was decided in the year 1878 by Chief Justice *Garth* and Mr. Justice *Markby*, 3 B. L. R., 443. In delivering judgment Sir *W. Markby* reviews with great care and discrimination the then existing authorities, judicial and non-judicial, and he shows that only in four cases had the point been brought before the Highest Courts of Appeal in India. There had been no decision at that time in Allahabad. The Madras High Court supported the adoption: so apparently did the Bombay High Court, for the judgment of Chief Justice *Westropp* which threw doubt upon the point, though delivered in 1875 was not reported as early as 1878. The learned Judge states the ground of his decision thus: "It appears to me therefore that the vast prepon-"derance of authority if not the entire authority in Bengal is

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"against the validity of the adoption of an only son, and if we were "to hold the adoption of the plaintiff in this case to be valid it "would be necessary to overrule both the carefully considered "decision of *Jackson* and *Dwarkanath Mitter*, JJ., and the equally "careful decision of four Judges of the Sudder Court. This of "course could only be done by a Full Bench. But we could only "refer the case to a Full Bench if there is a conflict or authority, or "if we ourselves differ from these decisions. Having gone through "all the cases with great care I do not think it can be said that "there is any such conflict of authority in Bengal as to justify "us in referring the case to a Full Bench on that ground, and I am "not prepared to refer the case to a Full Bench upon the ground "that I myself think the adoption of an only son valid. On the "contrary, on the best consideration I have been able to give to "the authorities I think such an adoption ought in Bengal to be "held to be invalid wherever the effect of holding such adoption to "be valid would be to extinguish the lineage of the natural father "and so to deprive the ancestors of the adopted son of the means "of salvation."

This is a very instructive judgment and entitled on all grounds to great respect; and it is with great respect that their Lordships, being obliged to differ either from it or from other High Courts, proceed to note some points which detract from its weight. As to the vast preponderance of authority in Bengal there were only two decided cases. One was before the Sudder Dewani Adaulut and is reported in 3 Select Reports, p. 232. The report does not show any examination of the question by the learned Judges themselves. Their decision appears to rest wholly upon the opinion of Pundits, who in their turn content themselves with a simple citation of texts. The other decision rests entirely on a principle which is untenable, as Sir W. Markby himself showed the year before in the case of *Janokee Debea*. Moreover the Court in 1878 hardly addressed itself to the question why the injunctions relating to the only son are imperative and legal while those which relate to the eldest son are only monitory or religious. In 1877 Sir *W. Markby* says that while the latter prohibition is only monitory the former is clear; referring, as their Lordships suppose, to the differences of expression in Colebrooke's translation of the Mitakshara. In 1878

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he intimates that the stronger objection to the adoption of an only son is based on religious grounds, on which their Lordships remark that Manu ascribes a character to the eldest son which affords strong religious grounds against his adoption, and that they do not find themselves competent to put such grounds in the balance against one another, so as to decide which is the stronger.

On this point they add that there seems to have been a great deal of exaggeration used in urging the religious topic throughout this controversy; especially in later times. Manu says that by the eldest son as soon as born a man discharges his debt to his progenitors; and it is through that son that he attains immortality. According to him the son serves his father's spiritual welfare at the moment of his birth. There is no intimation that if the boy dies the next day, or fails to have a son, this service is obliterated. Why then should it be so if the boy is adopted? It is true that Manu attributes additional value to the firstborn's son and grandson. It may be that such further benefit is lost by adoption, as it would be by death, but that is a very different thing from depriving the ancestors of the adopted son of the means of salvation, which have been already attained. Vasishtha, whose text is the fundamental one, does not rest his injunction on spiritual benefit at all, but he says that the only son is to continue the line of his ancestors; one of the very commonest of human motives for desiring legitimate issue. Nor does he make any allusion to "Put" here, or, if Mr. Justice *Knox* is right, elsewhere. If he was really thinking of the spiritual benefits of the son's ancestors as the ruling consideration, it is inexplicable that he should not have said so. Moreover, their Lordships asked during the argument why a man who had given a natural son in adoption could not afterwards if he was so minded adopt another; and neither authority nor reason was adduced to show that he could not.

That is the state of authorities in Bengal. The question has never come before a Full Bench, and it seems to their Lordships that there is only one decision, *viz.*, that of 1878, to which great weight is to be attached.

In Bombay, after a Division Bench had decided in favour of validity, the question was discussed before another Division

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Bench in the year 1875; *Lakshmappa* v. *Ramava*, 12 B. H. C. R., 364. The case was decided on another ground as has been mentioned above. But the Chief Justice, *Sir M. Westropp*, delivered an elaborate judgment containing his reasons for holding the adoption of an only son to be invalid. Those reasons appear to have been adopted by the Court, including Sir *M. Westropp* himself, in a subsequent case which was decided in 1879 but has never been reported. In 1889 the question was referred to a Full Bench who simply followed the unreported case. See 14 Bomb., p. 249. Sir C. Sarjent, then Chief Justice, delivered judgment. He pointed out that prior to *Lakshmappa* v. *Ramava* the decisions in Bombay were in favour of validity; that the judgment of *Sir M. Westropp* in that case was the first that treated the point with due consideration; and that as the opinion there expressed had been adopted by a Full Bench, it was not proper to review it. The decision was necessarily in favour of invalidity. The law in Bombay therefore rests on the authority of the unreported case of 1879 which itself rests on the reasoning contained in the judgment of 1875.

In that judgment the learned Chief Justice makes more elaborate reference to the Smritis than is contained in any judgment earlier than the present Allahabad case. He dwells emphatically on Colebrooke's translation of the Mitakshara, showing that with regard to the only son the expressiou "must not" and with regard to the eldest the expression "should not," is employed. He adds that the distinction is even more strongly marked in the Mayukha which is received as a high authority in Bombay. On this point their Lordships interpolate again the remark that they are not re-trying the Bombay decision and that the effect of the Mayukha has not been argued before them. He then examines decisions by Bombay Courts prior to the establishment of the High Court, which certainly exhibit a confusion of legal opinion. The authority of the High Court up to 1875, though not perhaps very decisive, was in favour of validity. From this, and from the decision of the Madras Court, the learned Chief Justice differs. He cites the passages of Smritis and law books and English text-writers with which we have now been made familiar. And his decision apparently is founded on the language of Colebrooke's Mitakshara and on the judgment of Mr. Justice *Mitter*. Their

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Lordships have already stated their reasons for thinking that the latter of these foundations is unsound. The value of the former will be examined presently. They have also stated above that the point actually decided in this case is a novel suggestion of the learned Chief Justice, and is unsustainable in principle, and unsupported by authority unless there be something peculiar to Bombay to support it.

Before leaving this judgment their Lordships ought to state their concurrence with the learned Chief Justice in his remarks on the so-called doctrine of *factum valet.* That unhappily expressed maxim clearly causes trouble in Indian Courts. Sir M. Westropp is quite right in pointing out that if the *factum,* the external act, is void in law, there is no room for the application of the maxim. The truth is that the two halves of the maxim apply to two different departments of life. Many things which ought not to be done in point of morals or religion are valid in point of law. But it is non-sensical to apply the whole maxim to the same class of actions and to say that what ought not to be done in morals stands good in morals, or what ought not to be done in law stands good in law. Sir M. Westropp has, not without cause, reduced the ambiguous maxim to its proper meaning.

Such was the state of judicial authority in India prior to the present cases. For as regards the Punjab, it is true that in the early days of the Chief Court, Judges have pronounced opinions in favour of the adoption under general Hindu law; and in 1874 *Melvill and Thornton* JJ., pointed out that the turning point of the controversy was Mr. Justice *Mitter's* judgment of 1868. But after the first reported case in 1867 the decisions there have turned on the popular customs into which the Government had the prudence to inquire immediately after the annexation, and which they made the foundation of law. The Punjab therefore may be omitted in our estimate of judicial authority. The reasons against the validity of the adoption of an only son are contained in the three judgments of the learned Judges, *Mitter, Markby* and *Westropp.* The point has never come before this Board for decision. It has been alluded to in two cases but in so indirect a way that though the authority of the Board is relied on by both sides it is not available for either. The foregoing remarks represent all the light which

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has been thrown on the Smritis to which after all we must recur to decide the question.

In addition to the remarks already made on the bearing of Manu's texts, those of Mr. Justice *Knox* upon his silence are worthy of attention. Manu mentions three conditions for a good gift of a boy in adoption. The natural father must be in distress; the boy must be "similar," apparently meaning of the same caste with the adoptive father; and he must be affectionate. Nothing is said about his having brothers, which is now represented as a vital condition, the breach of which is a sin, a heinous crime as some writers have called it and as annulling the transaction. It seems very unlikely that Manu should either have viewed it in that light, or with his very high notions of the value of the firstborn should have overlooked the point altogether.

The crucial text is that of Vasishtha. He first states the parents' power in the most sweeping terms, and derives it from causes affecting every child that is born into the world. The power is to later ideas, whether Hindu or English, an extravagant one; but it accords with what we know of the early stages of other nations and probably did not shock the contemporaries of Vasishtha, though the sage Apastamba, who is perhaps of equal antiquity, denies the right to give away or sell a child, (Prasna II., Patala 6, Khanda 13, paras. 6-11). A man may sell his son—no restriction of purpose is expressed—or he may even abandon him. But then comes an injunction expressed in terms which may amount to a command or may be only a recommendation; *viz.*, that an only son should not be given or accepted. The first remark to be made upon this is akin to the one just made upon Manu. If Vasishtha intended to except an only son from the father's power to give in adoption, why did he not say so? It would have been much more simple. But he first states the power, and far greater powers, in the broadest terms, and then adds a qualification which is, to put it at the highest, in ambiguous terms. That looks much more like an appeal to the moral sense not to exercise the power than a denial of its existence. In this respect the case resembles that of the father's power to alienate family property: which indeed is the light in which Vasishtha seems to regard a son. The power is given, while the action is condemned in terms consistent with actual prohibition.

After long controversy it has been settled by a great preponderance of Indian authority culminating in a decision by this Board, that the power exists, and that the prohibition, though a solemn warning as to the spiritual responsibility of exercising it, is not efficacious in law.

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In examining this question their Lordships are again at great disadvantage in not knowing Sanskrit. In the absence of agreement among Sanskrit students they cannot adopt the representations made, though by learned men, to the effect that as a matter of grammar Vasishtha's injunction imports admonition rather than command. So with respect to what has been called Jaimini's rule, which is so much relied on by Chief Justice *Edge* That author who wrote in the 13th century appears to have been received as a high authority in the interpretation of Smriti texts. He lays down the rule that all precepts supported by the assignment of a reason are to be taken as recommendations only. That, if sound, would be conclusive as to Vasishtha's text. But it is rather startling and a very intimate acquaintance with the Smritis would be needed before admitting its truth. It has not been brought forward in any case prior to this case from Allahabad. It may however fairly be argued that one who, having the power to give an absolute command, gives an injunction not expressed in unambiguous terms of absolute command but resting on a reason, is addressing himself rather to the moral sense of his hearers than to their duty of implicit obedience. So far Vasishtha's reason, founded as it is on temporal and not on religious considerations, gives some, though not very strong, support to the respondent's theory.

The text of Saunaka is open to two obvious remarks. One is that the injunction not to give an only son is couched in the same terms as the injunction to give a son if there are more than two. The latter of these cannot possibly be obligatory. The other remark is that, as Nanda Pandita in the Dattaka Mimamsa points out, Saunaka in effect prohibits a gift in adoption when there are only two sons; and that is a prohibition which has never beeen regarded as obligatory. Saunaka does not help the appellants but rather lends weight against them.

Then comes the Mitakshara. We have seen that Sir *M. Westropp* emphatically, and Sir *W. Markby* possibly, relies on the

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difference of expressions is Colebrooke's translation. The passages from their judgments have been quoted above, and so have the passages from the Mitakshara, Sec. 1., Ch. XI., paras. 10, 11, 12. Now it has been brought out in the arguments that precisely the same expressions of injunction are used by the author in these three paragraphs. To fortify their knowledge their Lordships have inquired of one of the most eminent of Sanskrit scholars, Professor Max Müller, and he has courteously informed them that as a matter of fact the three expressions are identical, and as a matter of grammar are, in his judgment, equally capable of expressing obligation or recommendation. Now paragraphs 10 and 12 have been observed on before. It has been placed beyond dispute in point of law that neither is obligatory. It requires some good reason to show why, when the same expression is used in three consecutive sentences, it should be construed one way in the 1st and 3rd and another way in the middle one. No such reason has been given. It is an unfortunate thing that in translating a law book Colebrooke should have used different English words to represent the same Sanskrit word. He has certainly misled at least one Judge in a leading case. As the matter is now shown to stand, the Mitakshara must be taken to bear strongly against the appellants.

In intimating that Sir *M. Westropp* was misled by Colebrooke their Lordships have not overlooked the fact that in 1889 Sir *C. Sarjent* thought that Sir *M. Westropp* was aware of the state of the Sanskrit text. It seems however next to impossible that Sir *M. Westropp* should have known that Colebrooke's variations of expression were not authorized by the original and should have said nothing about it; seeing that it deprives his emphatic reference to those variations of all meaning. If indeed he knew the state of the Sanskrit text and thought it so immaterial as not to deserve notice, he practically treated Colebrooke as the original authority and his reasoning does not thereby gain but loses in force.

The material passages in the two Dattaka books have been indicated before, and remarks have been made on those which quote and comment on Saunaka. It seems to their Lordships that the authors, who bring in the older text at every turn, did not mean to do more than repeat and enforce them. If they were clearly

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laying down any additional precepts or authoritative interpretations of ambiguities, then, though as Mr. Justice *Knox* points out, such comments should be received with some caution, they should also be received with due regard to the authority which the books have acquired. But on this topic the writers seem anxious to found themselves entirely on the Smritis and to refer their readers back to them. Certainly on the crucial point now in issue they throw no light at all. They do not touch the question whether the injunction not to adopt only sons is a matter of positive law or only addressed to the moral sense. And yet Jaimini's treatise written some centuries earlier than the Dattaka Mimamsa must have made the later of the writers if not both familiar with the importance of that distinction.

It is however worth while to observe how Nanda Pandita deals with the consequences of a forbidden adoption. He quotes Manu's requirement that the adopted son should be "similar" and he says (Sec. II, paras. 22, 23), "Hence it is established that one of "a different class cannot be adopted as a son." In Sec. III. he recurs to that prohibition and asks "should this rule be transgress-"ed what would be the case?" Then he deduces from texts of Saunaka and Katyayana that the adopted son shall not share in the inheritance, but shall be entitled to food and raiment. So that the adoption is not void, but the son of the wrong class is reduced to a claim for maintenance only. With this exception which favours the appellants' theory, it seems to their Lordships that these two treatises leave the question exactly where it stands on the earlier authorities.

From both the Courts below we learn that there is no resentment excited by this kind of adoption. The District Judge of Godavari says "The people have settled down under the law "enunciated in 1862." He can hardly recollect the state of things prior to 1862, but his statement of the present state of things is founded on personal knowledge. Whether the people have settled down under the High Court decision, a result which is usually of very slow growth if it takes place at all, or whether as is more probable that decision was in accordance with the ordinary existing ideas and practice, we are told that in point of fact there is no conflict between the declared law and the feelings of the people,

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Nor is there any indication that there ever was such a conflict. In Allahabad the parties are Agarwala Banias of Benares, who are, as two of the learned Judges below state, specially careful of caste and religious observance. The adoption was 20 years old and no caste penalties had followed it. These things do not prove a custom but they do tend to prove that among orthodox Hindus the adoption of only sons has never been so inculcated as a sin by their teachers as to excite abhorrence or social hostility, such as we know to follow some other breaches of their religious laws. That the practice is a frequent one is shown by the frequency of litigated cases, which must be quite insignificant in number as compared with those that actually occur, and from the establishment of customs authorising it in various places. This is not one of the cases in which people are tempted by appetite to break an acknowledged law. It is inconceivable that the choice of an only son for adoption can in any large number of cases proceed from any other cause than a conviction of its suitability to the circumstances. That is a family matter which a wise lawgiver, while warning parties of their spiritual responsibility, would yet leave it possible for them to do. The Hindu sages appear to have taken that course in this and kindred matters.

Their Lordships then have a case before them of which the broad outlines are as follows. Old books, looked on as divine, give to the father plenary powers over his sons. The same books discountenance the giving of an only son in terms which may be construed as a positive command making the gift void or as a warning pointing out the mischief of the act but leaving individual men to do it at their peril. The books contain no express statement which kind of injunction is meant. The practice of such adoptions is frequent. Over some substantial portions of Hindu society it is established as a legal custom, whatever may be the general law. In other very large portions it is held to be part of the general Hindu law. Nowhere is it known to be followed by hatred or social penalties. Pausing there, the case is one in which if the authoritative precepts are evenly balanced between the two constructions, the decision should be in favour of that which does not annul transactions acceptable to multitudes of families, and which allows individual freedom of choice.

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But what says authority? Private commentators are at variance with one another; judicial tribunals are at variance with one another; and it has come to this that in one of the five great divisions of India the practice is established as a legal custom, and of the four High Courts which preside over the other four great divisions, two adopt one of the constructions and two the other. So far as mere official authority goes there is as much in favour of the law of free choice as of the law of restriction. The final judicial authority rests with the Queeen in Council. In advising Her Majesty their Lordships have to weigh the several judicial utterances. They find three leading ones in favour of the restrictive construction. The earliest of them (in Bengal 1868) is grounded on a palpably unsound principle and loses its weight. The second in time (Bombay 1875) is grounded in part on the 1st and to that extent shares its infirmity; and in part on texts of the Mitakshara which are found to be misleading. So that it too loses its weight. The third (Bengal 1878) is grounded partly on the first, and to that extent shares its infirmity; but it rests in great measure on more solid ground, *viz.*, an examination of commentators and of decided cases. It fails however to meet the difficulty of distinguishing between the injunction not to adopt an only son and other prohibitive injunctions concerning adoptions which are received as only recommendatory; the only discoverable grounds of distinction being the texts of the Mitakshara which are misleading, and the greater amount of religious peril incurred by parting with an only son, which is a very uncertain and unsafe subject of comparison. The judicial reasoning then in favour of the restrictive construction is far from convincing. That the earliest Madras decision rested in part on a misapprehension of previous authority has been pointed out; and the Madras reports do not supply any close examination of the old texts or any additional strength to the reasoning on them. The Allahabad Courts have bestowed the greatest care on the examination of those texts, and the main lines of their arguments, not necessarily all the byways of them, command their Lordships' assent. Upon their own examination of the Smritis their Lordships find them by no means equally balanced between the two constructions but with a decided preponderance in favour of that which treats the disputed injunctions as only monitory and as leaving individual freedom of choice. They find themselves able to say with as much confidence as is consistent

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with the consciousness that able and learned men think otherwise, that the High Courts of Allahabad and Madras have rightly interpreted the law and rightly decided the cases under appeal.

Their Lordships has been reminded of the length of time for which the law must have been considered as settled in Bombay and Calcutta. A similar consideration affected the Courts of Madras and Allahabad and is remarked on by both. The time is not very long in any of the four provinces, but it is long enough to increase the gravity of the questions in these appeals. In estimating the weight of reasoning in the various litigated cases their Lordships have not forgotten the weight of the actual decisions; that they represent the opinions of eminent and responsible men, arrived at after public and anxious discussion, carrying with them an authority not legally disputable in the provinces under their jurisdiction, and it may be affecting many minds and many titles to property or to personal status. Such decisions are not lightly to be set aside. A Court of Justice, which only declares the law and does not make it, cannot, as the Legislature can, declare it with a reservation of titles acquired under a different view of it. But their Lordships are placed in the position of being forced to differ with one set of Courts or the other. And so far as the fear of disturbance can affect the question, if it can rightly affect it at all, it inclines in favour of the law which gives freedom of choice. People may be disturbed at finding themselves deprived of a power which they believed themselves to possess and may want to use. But they can hardly be disturbed at being told that they possess a power which they did not suspect and need not exercise unless they choose. And so with titles. If these appeals were allowed, every adoption made in the North-West Provinces and in Madras under the views of the law as there laid down may be invalidated, and those cases must be numerous. Whereas in Bengal and Bombay the law now pronounced will only tend to invalidate those titles which have been acquired by the setting aside of completed adoptions of only sons, and such cases are probably very few. Whether they demand statutory protection is a matter for the Legislature and not for their Lordships to consider. It is a matter of some satisfaction to their Lordships that their interpretation of the law results in that course which causes the least amount of disturbance.

Their Lordships will humbly advise Her Majesty to dismiss both appeals and the appellants must pay the costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Davies.

Ambalavana Desigar Pandara Sannidhi and another. } Appellant * (*Defendants*).

v.

Bappu Row Jagadap ... ... Respondent (*Plaintiff*).

Indian Limitation Act XV of 1877, Arts. 124, 134, & 144—Trustee—Alienation of trust properties—Suit by successor to recover the properties for the trust—Limitation. Ambalavana Desigar *v.* Bappu Row Jagadap.

Where the trustee of a religious endowment has alienated properties belonging to it and his successor brings a suit to recover the properties for the endowment, the fact that the plaintiff's predecessor neglected to perform the charities and the purchaser from him performed it regularly will not make the alienation one of a hereditary office, so as to bring the suit within the scope of Art. 124 of the Limitation Act.

Where a purchaser from a mortgagee or trustee has *actual* knowledge that his vendor was in possession of the properties only as a mortgagee or trustee, the Article of the Limitation Act applicable to a suit to recover the properties is not Art. 134 but Art. 144. *Radhanath Doss* v. *Gisborne*, 14 M. I. A. 1; *Muthu* v. *Kambalinga*, I. L. R., 12 M. 316; and *Pandu* v. *Vithu*, I. L. R., 19 B. 140, followed

Under the rulings of this High Court, the possession of a purchaser of trust properties from the trustee does not become adverse to the trust till the date of that trustee's death. *Mahomed* v. *Ganapathi*, I. L. R., 13 M. 277, and *Vedapuratti* v. *Vallabha*, *Ib.*, 13 M. 402, followed.

Appeal against the decree of the Subordinate Judge's Court of Tanjore in original suit No. 6 of 1897.

The facts appear from the judgment of *Subrahmania Aiyar, J.*

V. Bhashyam Aiyangar, V. Krishnaswami Aiyar, and *R. A. Krishnaswami Aiyar* for appellants.

P. S. Sivaswami Aiyar for respondent.

The Court delivered the following

JUDGMENTS:—*Subrahmania Aiyar,* J.—The village of Panangulam, which is in dispute, was, about the middle of the last century, granted by the then Raja of Tanjore as an endowment for the performance of certain charities in connection with a public temple in the town of Palani in the Madura District. There is no reason to doubt that the management of the charities was from the

* A. No. 129 of 1898. 21st February 1899.

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first vested in the plaintiff's family, and the income of the village continued till 1872 to be used by the plaintiff's ancestors for purposes contemplated by the grant. In that year, however, in execution of a decree against the plaintiff's father, the late Mahadeva Row, the then holder, the village was sold. At the auction the property was knocked down to the decree-holder through whom the defendants claim. The plaintiff is entitled to succeed to the office and to recover possession of the village if his right to do so is not time-barred.

With reference to this question of limitation, the first point for determination is whether the plaintiff's right to the office itself has been lost by prescription. The suggestion, on behalf of the defendants, that it has been thus lost—a suggestion made for the first time in this Court and but faintly—has, in my opinion, no good foundation. No doubt it is not shown that, after the transfer of the village in 1872, the plaintiff's father caused the charities to be performed. It is also true that it is the defendants that have been carrying on the charities. But in doing so they do not appear to have acted in virtue of any hostile claim to the office of manager, for at no time did they assert any such claim; and when in the suit No. 1 of 1890 (Exhibit D) the plaintiff's father was made 1st defendant and sued as the hereditary trustee of these charities, the present defendants who were made co-defendants with him made no objection to the position assigned to the plaintiff's father, which position was also recognized by the Court. As the learned vakil for the defendants stated in one part of the argument before us, the defendants, having acquired the village with money belonging to another temple in their charge, seem to have considered it meritorious to devote the incomes of the village, with other monies at their disposal, for carrying on the said charities. Consequently neither the circumstance that the charities were neglected since 1872 by Mahadeva Row, nor the fact that the defendants have taken upon themselves to cause them to be carried out can bring the case within Article 124 of the Limitation Act. And it follows that the plaintiff has not, as contended for the defendants, lost his right to the managership itself.

The next point for determination is whether the plaintiff's claim for the possession of the village is or is not within time. If,

as urged for the defendants, Article 134 of the Limitation Act is applicable to the case, the claim must fail, it having been instituted after the expiry of 12 years from the date of the court-sale. Is that article applicable? This raises the questions (i) whether a purchaser in an *execution* sale is within the Article, and (ii) if it is, whether the fact that the purchaser knew at the time of the sale that the property was held by the judgment-debtor merely as trustee and that the sale was not for a purpose binding upon the trust takes the case out of the operation of the Article, it being clear, if not admitted, that such knowledge was possessed by the transferee in the present instance.

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Now, as to the first of these questions:—The observations of the Judicial Committee in *Kalidas Mullick* v. *Kanhaya Lal Pandit* (I. L. R., 11 C. at 131), relied on on behalf of the plaintiff, do not in my opinion support the contention that their Lordships have laid down that a purchase in execution of a decree is not a purchase within the meaning of Article 134. There the purchaser bought the right, title and interest of a grantee of lands *for her life*, though such grant had made her a trustee for certain purposes. And, as I understand the observations in question, their Lordships decided nothing more than that a suit brought *after the death of the grantee for her life* by a person, claiming through the grantor, is not governed by Article 134, irrespective of the question whether a purchase in an involuntary sale does or does not come within the Article—as to which no opinion was expressed. But *Bhagawan Sahai* v. *Bhagawan Din* (I. L. R., 9 A. 97,) and *Pandu v. Vithu* (I. L. R., 19 B., 140), which were also cited on behalf of the plaintiff, are directly in favour of the view that a purchase in an execution sale is not within the article, while the decision of this Court in *Muthu* v. *Kambalinga* (I. L. R., 12 M., 316), cited on behalf of the defendants, is different. Whether he last-mentioned decision is, as urged for the plaintiff, not reconcilable with the ordinary meaning of the terms 'purchased *from*' in the article, it is not necessary to discuss, as, for reasons, which I shall at once proceed to state, the article, it seems to me, cannot be applied to the case upon the facts established here.

Now, though the law, laid down in the article under consideration, is in one material respect different from that laid down in

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Section 5 of Act XIV of 1859, still, with reference to the word "purchased" to be found in both the article and the section, the construction adopted by the Judicial Committee in *Radhanath Doss* v. *Gisborne* (14 M. I. A., 1) decided under Act XIV of 1859 should, as pointed out in *Muthu* v. *Kambalinga* and *Pandu* v. *Vithu*, already quoted, be taken as governing the interpretation of the article also. And since the word 'purchased' therein must have the same meaning whether the purchase is from a mortgagee, or a trustee, it follows, having regard to the explanation given by Lord Cairns at page 16 of the report, that a person purchasing from a trustee, in order to bring himself within the article, must show that he purchased that which is *de facto* trust property upon a representation that what is transferred is the absolute title thereto and in the *full belief* that the purchaser is acquiring such title. It does not let in a purchaser who knew that the vendor could not transfer the absolute title, or even, if he could, that there were circumstances in the particular case which disentitle him to convey the absolute title. In making this statement, I have not omitted to take notice of the fact that a manager of an endowment, like the one we are dealing with, can, in certain circumstances, sell the trust property to one who is aware of the trust, so as to give him a perfectly good and absolute title. In such a case if the sale turns out to be invalid in consequence of the vendee having been aware of the fact or facts rendering the sale one not binding upon the institution, such transferee is as little entitled to rely on the article as one who becomes a transferee from a mortgagee purporting to sell the mortgaged property in the exercise of a power of sale under the mortgage, but which sale fails for reasons within the knowledge of the transferee. That the transferee in the latter case cannot rely on the article in question is obvious; because he is not one who, in the words of Lord Cairns, "purchases that which *de facto* is a mortgage upon a representation made to him and in the full belief that it is not a mortgage but an absolute title." (14 M. I. A. at 16.) In the former case, as in the latter, *actual knowledge* on the part of the transferee of facts invalidating the sale must make it impossible for the Court to arrive at the finding that there was that 'full belief' which, according to Lord Cairns, is essential to constitute the transferee a 'purchaser' within the meaning of the provision of the law under consideration.

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Is the claim then barred under Article 144 which is the other article relied on? Of course, in having mortgaged the village in question for his own private debt and allowed the property to be sold for such debt, Mahadeva Rao was guilty of a gross breach of trust, and the decree-holder, who became the transferee at the auction-sale, was clearly privy to such breach of trust. In these circumstances, it would by no means seem inequitable to hold that the transferee's possession did not become adverse during the time the manager who had committed the breach of trust remained in office, especially if regard be had to the disability which ordinary worshippers—the real beneficiaries in these cases—labour under according to the decisions in this Presidency in the matter of legal proceedings against alienees claiming under transactions amounting to breaches of trust on the part of managers of public temples. For, according to the view of the law prevailing in this Presidency, worshippers interested in such temples cannot sue alienees in the position of the defendants under Section 539 of the Code of Civil Procedure—compare *Rangasami Naicken* v. *Varadappa Naicken* (I. L. R., 17 M., 462). Nor can they—the alienees—be proceeded against under Section 14 of the Religious Endowments Act XX of 1863 (Appeal 122 of 1898); and Section 30 of the Civil Procedure Code does not enable worshippers to sue either managers or alienees concerned in transactions whereby such institutions may be defrauded. *Adamson* v. *Arumugam* (I. L. R., 9 M., at 466) and *Sajedor Raja* v. *Baidyanath Deb* (I. L. R., 20 C. at 407-8). It would thus seem that the general body of worshippers interested in institutions of that description have themselves no remedy whatever against persons taking trust property under improper alienations like that under which the defendants claim. It is, of course, futile to say that a trustee betraying his trust can, or will, effectively take steps to repair his breach of trust. It is his successor that can and may ordinarily be expected to do so. These considerations disincline me to raise any questions as to the correctness of the view taken in *Mahomed* v. *Ganapathi* (I. L. R., 13 M., 277), *Vedapuratti* v. *Vallabha* (*Ib.* 462) and other cases, to the same effect but unreported, and to hold that the possession by the defendants prior to Mahadeva Row's death, which occurred in 1893, was adverse to the plaintiff, though I must admit that, had the question been *res integra* in this Court, the strict reasoning adopted in the decisions

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of other Courts cited for the defendants would make me hesitate to decide as I do now.

I would therefore dismiss the appeal but without costs.

Davies, J.:—I concur.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Davies.

Mayan Pathoothy and another ... Appellants* (*Plaintiffs*),

v.

Pakuran and others ... ... Respondents (*1st, 2nd, 4th to 6th Defendants*).

Mayan Pathoothy v. Pakuran.

Transfer of Property Act, S. 99—Money decree in favour of a mortgagee—Execution of decree—Sale of mortgaged properties, validity of—Civil Procedure Code, S. 244—Suit by judgment-debtor to cancel the sale.

[*Obiter:* In spite of sale and purchase in execution of a money decree by the mortgagee the mortgagors may sue to redeem the mortgaged properties on payment of the mortgage-money and so much of the money due under the money-decree as was satisfied by the sale. *Martand* v. *Dhondo*, I. L. R., 22 B., 624, referred to, and approved.]

The parties to an execution proceeding can raise the question of the validity of a Court-sale only in proceedings instituted under S. 244, C. P. C., and not in a separate suit.

But if the suit is instituted in the very Court in which execution proceedings should be taken, the Court may treat the plaint as an application under S. 244, C. P. C., and give relief accordingly. *Biru Mahata* v. *Shyama Churn*, I. L. R., 22 C., 483, approved.

When once the sale has been confirmed by the Court, and has become final, the sale cannot be set aside at the instance of the judgment-debtor. *Durgayya* v. *Anantha*, I. L. R., 14 M., 74, referred to.

A sale in contravention of the provisions of S. 99 of the Transfer Property Act is not void but only voidable as against those who have a right to redeem.

Second appeal from the decree of District Court of North Malabar in A. S. No. 313 of 1897, reversing the decree of the District Munsif of O. S. No. 161 of 1897.

This was a suit to set aside a sale of two items of property in execution of a money-decree obtained by the 1st defendant against plaintiffs and defendants 2 to 5. It was alleged in support of the claim that the

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* S. A. No. 22 of 1898. 9th January 1899.

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1st defendant had a mortgage right over the very properties for Rs. 4,500, that therefore under S. 99 of Transfer of Property Act, the properties could not be brought to sale except under a decree for sale of the mortgaged properties under S. 67 of the Act. The 1st defendant contended that the matter was one arising in execution under S. 244, Civil Procedure Code, and could not be made the subject of a separate suit, and that since the plaintiffs paid the balance due under the decree, they had submitted to the Court-sale and were consequently estopped from questioning its validity. The District Munsif overruled both these contentions and decreed the plaintiffs' suit. On appeal, however, the District Judge relying on the ruling of the Privy Council in I. L. R., 19 Cal., 683, held that a party to the execution proceedings could not maintain a separate suit to have the sale in execution set aside and dismissed the plaintiffs' suit. Against that decision the plaintiff preferred this second appeal on the grounds that S. 244 had no application to the case, and that even if it should be held that the matter was one which could be raised only in execution, this suit might and should have been treated as an application under S. 244, Civil Procedure Code.

C. Krishnan for appellants.

K. P. Govinda Menon for 1st respondent.

The Court delivered the following

JUDGMENTS:—*Subrahmania Aiyar*, J.—The sale which is impeached is doubtless contrary to the provisions of S. 99 of the Transfer of Property Act. The first point for determination is whether, as contended for the appellants—the mortgagors—the sale is altogether null and void. The argument that in allowing the sale to take place against the provisions of the said section the Court acted without jurisdiction is obviously unsustainable. Still, if the above section were enacted for the protection of public interests and the law were to be regarded as laying down a rule of general policy rendering the prohibition absolute, the sale would be void. But if the section in question has been introduced for the benefit of a particular class of persons the sale would be but voidable (compare Hardcastle on the Construction of Statutes, 2nd Edn., p. 285) and the cases cited therein; see also Maxwell on Interpretation, 3rd Edn., pp. 544-9). That it is of the latter description

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is apparent, the object being to protect only persons concerned with the right to redeem mortgaged property. The sale cannot, therefore, be held to be void.

The next point for determination is whether the appellants are now entitled to the relief claimed, *i.e.*, to have the sale set aside. The question being one arising between the parties to the suit wherein the sale was made and relating to execution cannot be raised and decided in a suit. It should be raised and tried only in execution proceedings taken under S. 244 of the Code of Civil Procedure. However, the Court in which this suit was brought is the tribunal wherein the execution proceedings should be taken. We can, following *Biru Mahata* v. *Shyama Chirn Khawas*, I. L. R., 22 C., 483, allow the plaint to be treated as an application under S. 244 and set aside the sale if it were possible to do so now. But it is not. The sale has been confirmed. The order confirming the sale is final and concludes the appellants from seeking the relief to which they would have been otherwise clearly entitled. As regards *Durgayya* v. *Anantha*, I. L. R., 14 M., 74, I observe that there the purchaser did not take the point that the order confirming the sale if allowed to become final debars the judgment-debtor from subsequently impeaching the sale altogether. In my view, therefore, the appellants are not entitled to the relief which they seek. I should, however, not omit to say that I am not to be understood to lay down that they will be precluded from redeeming the property or taking proceedings for that purpose. For, notwithstanding the confirmation, the sale in question cannot affect that right of the appellants owing to the impossibility of the respondent as the mortgagee, by such a sale and purchase freeing himself from the liability to be redeemed, *Martand* v. *Dhondo*, I. L. R., 22 B., 624. It may be added that while the respondent must, notwithstanding his purchase, submit to be redeemed, he would be entitled to claim at the time of redemption, payment of what he gave credit for out of the decree-debt due by them in consideration of the purchase in question. Neither of these questions arises in the present suit. The second appeal in my opinion fails, and I would dismiss it but without costs.

Davies, J.—I concur.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Boddam.

Ramakkal ... ... Appellant* (*Plaintiff*),

v.

Ramasami Naicken ... ... Respondent (*Defendant*).

Ramakkal *v.* Ramasami Naiken.

Hindu Law—Co-widows—Partition among co-widows—Right of survivorship.

Co-widows may, by express agreement between themselves, put an end to their right of survivorship.

Second appeal from the decree of the District Court of Coimbatore in A. S. No. 184 of 1897, reversing the decree of the District Munsif of Udumulpet in O. S. No. 392 of 1897.

The plaintiff and one Venkatammal, deceased, were widows of one Kichama Naicken. The two widows effected a partition of the family properties in 1889. Subsequently in 1892, Venkatammal died, having gifted items 2 and 3 of the plaint properties to the 2nd defendant and sold the rest to the 1st defendant. The plaintiff then brought this suit to recover the properties of the deceased Venkatammal, in virtue of her right of survivorship. The defendants, on the other hand, contended that by the partition of 1889 the plaintiff absolutely relinquished all her right to the plaint properties in favour of Venkatammal, and that therefore she was estopped from claiming the properties by survivorship. The District Munsif held that partition among co-widows was not recognised by the Hindu Law, that it was not open to the widows to put an end to the right of survivorship, and that therefore the plaintiff's suit should be allowed. On appeal, however, the District Judge held that though no partition could be made among co-widows so as to affect the right of the reversioners, yet so far as the limited interests of the widows themselves were concerned, they could alienate to the fullest extent, and that therefore there was no reason why they could not agree to forego their right of survivorship. He therefore reversed the decision of the lower Court and dismissed the suit with costs. Hence this second appeal.

P. S. Sivaswami Aiyar for appellant.

S. Kasturiranga Aiyangar for defendant.

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* S. A. No. 799 of 1898. 24th February 1899.

Ramakkal v. Ramasami Naiken.

The Court delivered the following

JUDGMENT.—We think that there is no legal obstacle to prevent one of two co-widows by apt words in a deed so far releasing her right of survivorship as to preclude her from recovering after the other co-widow's death from an alienee, property given by way of partition to the latter and alienated by her.

In this case two co-widows entered into a deed which they called a deed of partition whereby they divided the property between them and each gave the other full power of alienation. One of the widows alienated her share, and after her death, the other widow, the plaintiff, sued as the surviving widow to recover the property so alienated. The District Judge held that she was estopped by her own deed from recovering. It is argued before us that, whatever may be inserted in a deed of supposed partition between co-widows, nothing can preclude the surviving widow from recovering, as there was no legal power which enabled widows to make a partition, except for the period of the life of each. For the property can only be held separately by widows for the purpose of the maintenance of each of them during her life, and that after the death of any one, the share reverted to the survivor. We have no doubt that a widow can alienate for her life any estate which comes to her as such, and that she can, therefore, enter into such a deed as will preclude her from recovering during her life property which she has alienated to the full extent of such alienation, provided it does not extend beyond her life-interest.

Substantially the analogous case of daughters was so decided in Calcutta *Kailash Chandra* v. *Kashi Chandra*, I. L. R., 24 C., 339.

We therefore dismiss the second appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Shephard and Mr. Justice Boddam.

Ramanujachariar ... ... Appellant * (2nd Defendant),

v.

Srinivasachariar ... ... Respondent (Plaintiff).

Ramanujachariar v. Srinivasachariar.

Hindu Law—Joint undivided Hindu family—Mortgage executed in favour of one of the members—Suit on the mortgage by that member—Non-joinder.

Where the contract is made with a member of a joint undivided Hindu family, he can sue upon it without joining the other members, though the contract was really entered into for the benefit of the family.

Second appeal from the decree of the District Judge of North Arcot in A. S. No. 115 of 1897, modifying the decree of the District Munsif of Arni in O. S. No. 622 of 1895.

This was a suit to recover Rs. 850 on a hypothecation bond for Rs. 800 executed by 1st defendant to plaintiff. The 2nd defendant, a purchaser from the 1st defendant of certain of the hypothecated properties, contended *inter alia* that the suit was bad for non-joinder of the plaintiff's undivided sons who were also interested in the mortgage-money. This contention as to non-joinder was disallowed by both the Courts below. On consideration of the case on the merits the District Munsif gave the plaintiff a decree as prayed for in his plaint and the District Judge confirmed the decree of the District Munsif with a slight modification as to costs, in respect of which he made all the defendants liable. Against this, the 2nd defendant appealed.

T. V. Seshagiri Aiyar for appellant.

P. R. Sundara Aiyar for respondent.

The Court delivered the following

JUDGMENT:—We think there is no non-joinder. The contract was made with the plaintiff alone in his own name, and he was entitled to sue upon it alone. The case is practically indentical with S. A. No. 675 of 1898.

We therefore dismiss the appeal with costs.

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*S. A. No. 889 of 1898. 27th February 1899.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Shephard and Mr. Justice Boddam.

Ranganaikulu and another ... Appellants* (*Plaintiffs*),

v.

Sattamma ... ... Respondent (1*st Defendant*).

Ranga-naikulu v. Sattamma.

Document—Forgery—Subsequent ratification, validity of.

A void transaction cannot be made good by ratification.

Second appeal from the decree of the District Court of Godavari in A. S. No. 248 of 1897, reversing the decree of the Subordinate Judge of Cocoñada in O. S. No. 28 of 1896.

The suit was for a declaration that a certain hypothecation bond purporting to have been executed by the 3rd defendant as the guardian of the 1st plaintiff was a forgery, and was not binding on the plaintiffs. The plaintiffs stated that the 3rd defendant was the adoptive mother and guardian of the 1st plaintiff, that the 2nd defendant had fabricated a hypothecation bond for Rs. 2,000 as if executed by the 3rd defendant in her capacity as guardian, that in fact, he had attained majority on the date on which the document was said to have been executed, that no consideration was paid for the bond, and that for all these various reasons the document was not binding on them. The 3rd defendant supported the plaintiffs' case and denied having executed the document. The defendants 1 and 2 *inter alia* contended that the document was executed by the 3rd defendant on behalf of the 1st plaintiff who was then a minor, that the money was borrowed for carrying on the family business, and that the plaintiff on coming of age had ratified the transaction and was estopped from disputing its validity. The District Munsif on an examination of the evidence in the case came to the conclusion that the plaintiff was a major at the date of the document, and that the document was a forgery by the 2nd defendant. As to the defence of ratification he found that the 2nd defendant took undue advantage of the plaintiff's straitened circumstances and seized the opportunity to get him to execute a pronote for Rs. 100 borrowed of him and also to write the Ex. III to his dictation, acknowledging his liability under the forged bond.

* S. A. No. 891 of 1898. 27th February 1899.

Under these circumstances he considered the ratification to be invalid and made the declaration asked for by the plaintiff. On appeal the District Judge, while agreeing that the document was a forgery, decided that the plaintiff was estopped by the ratification in Ex. III. From this decision the plaintiff appealed on the ground that there could be no ratification of a void transaction. Ranganaikulu v. Sattamma.

V. Krishnaswami Aiyar for appellants.

P. R. Sundara Aiyar for respondents.

The Court delivered the following

JUDGMENT :—It being found that the bond was a forgery, there can be no question of ratification. That which is void cannot be ratified. An admission made by the plaintiff might under certain circumstances have created an estoppel, or it might be a ground for the Court refusing to grant relief and leaving the plaintiff to the defence when sued on the bond. But the mere writing of a letter, especially under the circumstances stated by Sub-Judge, affords no reason for refusal to grant a decree.

We reverse the decree of the District Judge and restore that of the Sub-Judge with all costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Davies.

Venkatappayya and others ... Appellants * (*Plaintiffs*),

v.

Venkatapathi and others... ... Respondents (*Defendants*).

Act XX of 1863, S. 14—Breach of trust by the agent of the trustee—Suit against agent, whether maintainable under the Act. Venkatappayya v. Venkatapathi.

A mere agent of the trustee of a temple cannot be sued for breach of trust or neglect of duty under S. 14 of Act XX of 1863.

Appeal from the decree of the District Court of Kistna in O. S. No. 4 of 1895.

This is a suit to have the defendants removed from the management of the temples of the village of Cherukur. The ancestors of defendants 6 and 7 were the hereditary dharmakartas of these

* A. No. 133 of 1898. 6th February 1899.

Venkatappayya v. Venkatapathi.

temples and were in management of the same till the year 1859, when they ceased to take any active part in the management and left it entirely in the hands of defendant No. 5 and the ancestors of defendants 1 to 4. The ancestors of the first four defendants and subsequently defendants 1 to 5 misappropriated the temple funds and otherwise acted irregularly in matters connected with the temples. Hence this suit for their removal from the management of the temple under S. 14 of Act XX of 1863 and for an account of the income and expenditure during their management. It was *inter alia* contended that the defendants not having been sued as the properly constituted dharmakartas of the temples the suit was not sustainable under the Act. The District Judge without going into the other issues in the case decided that the defendants 1 to 5 were not properly constituted managers or superintendents, that they were merely the agents of defendants 6 and 7, and that the present suit was not sustainable according to the ruling in 2 M. 58. He accordingly dismissed the suit. Hence the appeal.

C. R. Pattabhiramaiyar and *P. Nagabhushanam* for appellants.

V. Bhashyam Aiyangar, and *S. Srinivasa Aiyangar* for respondents.

The Court delivered the following

JUDGMENT:—The plaintiffs' case has throughout been that defendants 1 to 5 are not themselves trustees, the trustees being the 6th and 7th defendants by whose license the defendants 1 to 5 are managing the affairs of the temple. As such mere agents, defendants 1 to 5 cannot be proceeded against for breach of trust or neglect of duty under S. 14 of Act XX of 1863 (compare *Ramasami Aiyar* v. *Venkataram Aiyar,* I. L. R., 2 M. at pp. 60-61.) *Muhammad Siraj-ul-haq* v. *Imam-ud-din,* I. L. R., 19 A., 104, is distinguishable from this, inasmuch as the defendant there was treated as the trustee and not as an agent as here. The dismissal of the suit so far as the defendants 1 to 5 are concerned was therefore right, and as against them the appeal is dismissed with costs. As regards the 6th and 7th defendants, however, the suit must proceed, and to that extent the appeal is allowed and the suit remanded for disposal according to law. Costs to abide and follow the result.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Shephard and Mr. Justice Subrahmania Aiyar.

Venkataramachandra Rao ... ... Appellant * (*Plaintiff*),

v.

Veeramma ... ... Respondent (*Defendant*).

Venkata-rama-chandra Rao *v.* Veeramma.

Registration Act, S. 77—Limitation—Mode of computing time—Suit to enforce registration and declare adoption—Misjoinder of causes of action—Practice.

In computing the period of 30 days allowed by S. 77 of the Registration Act for the institution of a suit, the day on which the order refusing to register the document was passed ought to be excluded.

In a suit brought under S. 77, no claim other than that to have the document registered can be joined. But when other claims are joined, the court should not dismiss the suit altogether, but should direct the plaintiff to amend the plaint.

Appeal from the decree of the District Court of Godavari in O. S. No. 15 of 1897.

The plaintiff, a minor, brought this suit through his next friend for a declaration of the validity of his adoption to one Venkatakrishnaiya and for an order directing the registration of the last will and testament of the said Venkatakrishnaiya. The defendant, the testator's widow, who denied the fact of adoption and opposed the registration of the document, took two preliminary objections to the plaintiff's suit—(1) that the suit was brought more than 30 days after the Registrar's order and was therefore barred under S. 77 of the Registration Act, and (2) that the suit was bad for misjoinder of causes of action. The Registrar had refused to register the document on the 29th March 1897, and this suit was filed on the 28th April 1897. The District Judge held that in computing the 30 days allowed by S. 77, the 29th of March—the date of the order—should be included, and that therefore the suit instituted on the 28th April was not in time. On the second point, he held that no other claim should be joined in a suit for compulsory registration under S. 77 of the Act, and that the suit was therefore bad for misjoinder. On both these grounds he dismissed the plaintiff's suit. Hence this appeal.

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* A. No. 180 of 1898. 14th February 1899.

Venkatarama-chandra Rao v. Veeramma.

T. V. Seshagiri Aiyar for appellant.

W. Subba Rao, V. Krishnaswami Aiyar, and *P. Nagabhooshanam* for respondents.

The Court delivered the following

JUDGMENT:—We are clearly of opinion that in calculating the 30 days, the day on which the order was passed, ought to be excluded. We agree with the District Judge in his view that no other claim can be joined in a suit brought under S. 77 of the Registration Act. But we think the Court should have directed the plaint to be amended instead of dismissing the suit altogether.

We must, therefore, set aside the decree and remand the suit, directing the District Judge to fix a time for the amendment of the plaint, and if the plaint is amended to proceed according to law.

Appellant must pay costs of this appeal. Other costs to abide result.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Davies.

Viyathen Sreedevi ... ... Appellant* (*Defendant*),

v.

Veerarayan ... ... Respondent (*Plaintiff*).

Viyathen Sreedevi v. Veerarayan.

Mortgage—Kanom, nature of—Suit to recover kanom amount, whether maintainable.

A kanom, in so far as it is a mortgage, is a usufructuary mortgage and not a combination of a usufructuary and a simple mortgage; consequently no suit will lie for the recovery of the kanom amount.

Second appeal from the decree of the Subordinate Judge of Calicut in A. S. No. 54 of 1894, affirming the decree of the District Munsif of Calicut in O. S. No. 403 of 1897.

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* S. A. No. 771 of 1898. 27th January 1899.

The plaintiff, a kanomdar, brought this suit to recover the kanom amount, Rs. 339-14-0, on the security of the properties let out to him on kanom. The defendant contended that the suit was a novel one, and that a kanomdar could not maintain a suit to recover the money. The District Munsif held that a kanom, in the mortgage aspect of it, was a simple mortgage, and that a suit for the recovery of the kanom amount would lie. On appeal the District Judge relied on the observation of *Muthuswami Aiyar*, J., in 15 M. 366, and confirmed the decision of the District Munsif. Hence the appeal.

Viyathen Sreedevi *v.* Veerarayan.

P. R. Sundara Aiyar for appellant.

Appu Nedungadi for *C. Sankaran Nair* for respondent.

The Court delivered the following

JUDGMENT:—In the instrument sued upon there is no covenant to pay—nor was there any evidence that a promise to pay was one of the incidents of a "kanom" according to usage. It has been uniformly held that a "kanom" in the mortgage aspect of it is a usufructuary mortgage, and except an observation of the late *Muthuswami Aiyar*, J., in *Ramunni* v. *Brahma Dattan*, I. L. R., 15 M. 369, that it is both a simple and a usufructuary mortgage, there is no authority in support of the view that it is a simple mortgage, nor do we see anything in the character of the transaction or its incidents to make it a simple mortgage.

We are, therefore, unable to hold that it is so. In this view, the present suit for the recovery of the money and sale of the mortgaged property in default of payment was unsustainable. We must, therefore, reverse the decrees of both the Courts below and dismiss the plaintiff's suit without costs, as the point is a novel one.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Arthur Collins, *Kt.*, Chief Justice, and Mr. Justice Benson.

Yachendrulu Varu ... ... Appellant* (*Plaintiff*),

v.

Narayanasami Chetty ... ... Respondent (*Defendant*).

Yachendrulu Varu *v.* Narayanasami Chetty.

Malicious prosecution—Suit for damages—"Malice," what?

Where a complainant states completely and truly the facts which form the basis of his complaint, the fact that he misconceived the nature and *extent* of the crime committed by the accused, will not make the complaint other than *bonâ fide*, and the complainant will not, in an action for malicious prosecution, be liable to pay damages to the accused.

Appeal from the decree of the Subordinate Judge's Court of Nellore in O. S. No. 59 of 1896.

The plaintiff brought this suit to recover damages for malicious prosecution. The material facts of the case are these: The plaintiff is one of the younger brothers of the Rajah of Venkatagiri. The defendant is the Dewan of the Rajah. The defendant having been invited by Venkatakrishna, another brother of the Rajah, went to witness the Dasara sports to the bungalow of the said Rajah Venkatakrishna. He went in and took his seat along with some others who were already there. One Ramudu, a servant of the plaintiff, came in and asked the defendant to vacate his seat, and said that, if he did not so vacate the seat immediately, he would be severely dealt with. Subsequently two others came in and similarly addressed the defendant in an insulting way, and one of them shook the chair in which the defendant was sitting in a violent manner. The defendant then vacated the seat with the object of seeing Rajah Venkatakrishna and complaining to him of the insolence of the servants. At that moment the plaintiff cried to the two persons abovementioned to shove the defendant out. On these facts the defendant filed a complaint before the Magistrate, saying that all this was done at the instigation of the plaintiff, and praying that security for good behaviour might be taken from the plaintiff. The Magistrate inquired into the complaint, held the case not proved and discharged the plaintiff under S. 253 of the Code of Criminal

* A. No. 116 of 1898. 29th November 1898.

Yachendrulu Varu v. Narayanasami Chetty.

Procedure. The plaintiff then brought this suit for damages, alleging that the charges brought against him by the defendant were false, reckless and malicious, and made without reasonable or probable cause. The Subordinate Judge found that the charges were substantially true and were not made without reasonable or probable cause. He therefore dismissed the plaintiff's suit. Against this decision the plaintiff appealed.

C. Ramachandra Rao Saheb for appellant.

E. B. Powell and *S. Subrahmania Aiyar* for respondent.

The Court delivered the following

JUDGMENT:—The Sub-Judge has found that all the facts were truly stated by the defendant in his complaint to the Magistrate, and also that he had reasonable and probable cause for believing that the assault on him was instigated by the present plaintiff. We have gone into the evidence at length, and we are obliged to arrive at the same conclusion. It is justified by the evidence, by the conduct of the defendant in at once informing the Police Inspector and in writing to complain to his friend Venkatakrishna at whose invitation he went to the sports, by the conduct of the latter, and by the surrounding circumstances and probabilities of the case.

It is, however, contended that even on this finding damages should have been given, because the defendant in his complaint alleged that the offences of abetment of house-trespass and defamation, as well as abetment of assault, insult and criminal intimidation had been committed, and also prayed that security might be taken from the plaintiff to be of good behaviour.

We are unable to accept this contention. If the defendant without stating the facts at all, or without stating them truly, had alleged that the plaintiff had been guilty of abetment, of house-trespass and defamation, and had done acts which rendered him liable in law to be required to give security to be of good behaviour, and if the defendant had then failed to prove that acts had been done to justify such allegations, it might be that he would be liable in damages; but in the present case he stated the facts truly and erred merely in supposing that the facts so stated constituted offences under certain sections of the Indian Penal Code, which

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they did not, in fact, amount to and in supposing that the facts would justify the Magistrate in requiring the plaintiff to give security to be of good behaviour. The mistake of the defendant in asking for the one remedy instead of the other is not sufficient to render him liable to be cast in damages, especially when it appears that the Magistrate took no action on this part of the complaint, and no injury was thereby caused to the plaintiff. We do not think that there is any ground for holding that the defendant was actuated by any motive other than an honest desire to bring the offenders to justice and to maintain his own position and independence in the face of unwarranted insults and assaults. We concur in the findings of the Sub-Judge and dismiss the appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

FULL BENCH.

Present:—Mr. Justice Shephard, Mr. Justice Subrahmania Aiyar, and Mr. Justice Davies.

Muthuraman Chettiar ... ... Appellant* (*4th Defendant*),

v.

Sundra Kumura Ettappa Sami and others ... } Respondents (*Plaintiff* and *Defendants* 1 to 3).

Muthuraman Chettiar *v.* Sundara Kumura Ettappa Sami.

Civil Procedure Code, Ss. 244, 266, cl. (*l*)—Annuity to a man and his heirs—Maintenance—Attachment—Transfer of Property Act, S. 99—Mortgage of annuity—Suit upon mortgage—Money-decree—Sale in execution—Suit to redeem.

An annuity to a man *and his heirs*, though expressed to be payable for maintenance, does not fall within the terms of clause (*l*), S. 266 of the Code of Civil Procedure, and may be attached and put up for sale in execution of a money-decree.

A sale of mortgaged properties by the mortgagee in execution of a money-decree is contrary to the provisions of S. 99 of the Transfer of Property Act, and does not interfere with the right of redemption possessed by persons not parties to the suit; and this, although the money-decree was passed in a suit upon the mortgage in which a decree for sale might properly have been made.

A son in a Mitakshara family is not bound by a sale in defiance of S. 99, Transfer of Property Act [although he would be bound by a sale in execution of a proper mortgage-decree against the father].

Persons who were not parties to the money-decree in execution of which the mortgaged properties were brought to sale, need not and cannot institute proceedings under S. 244 of the Civil Procedure Code in order to question the sale but may file a regular suit for redemption of their share of the mortaged property.

Second appeal from the decree of the District Court of Tinnevelly in A. S. No. 301 of 1896 affirming the decree of the Court of District Munsif of Satur in O. S. No. 336 of 1895.

The facts necessary for the purposes of this report appear from the judgment.

C. Ramachandra Rao Saheb, V. Bhashyam Aiyangar and *T. Rangaramanujachariar* for appellant.

C. R. Pattabhirama Aiyar and *R. Kuppusami Aiyar* for 1st respondent.

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* S. A. No. 82 of 1898. 14th February 1899.

Muthuraman Chettiar v. Sundara Kumura Ettappa Sami.

Their Lordships delivered the following

JUDGMENTS :—*Subrahmania Aiyar*, J.—Muthu Vencatachala Maniagar, who was about the year 1846—48 the Zemindar of Vadimittah in the Tinnevelly District, and the plaintiff's great-grandfather Sundaravala Kumarasami Maniagar were undivided sapindas. The brothers of the Zemindar sued in the Tinnevelly District Court apparently for the partition of the zemindari and other properties. By the decree, passed by that Court, Sundaravala Kumarasami was held entitled to a moiety of the estate. The Zemindar appealed against the decree to the Sadr Court in A. S. No. 20 of 1846. But pending the appeal he and Sundaravala Kumarasami entered, on the 12th December 1848, into a razinama adjusting their disputes. By the razi it was provided that Sundaravala Kumarasami having renounced the right which the decree under appeal gave him, he and *his heirs* were (i) to enjoy some lands, situated in the zemindari as his own farm, subject to the payment to the Zemindar of a quit-rent of Rs. 50; (ii) to receive one-third of the net income of certain *pannai* lands in the possession of the Zemindar; and (iii) to receive annually for maintenance, out of the rents payable to the Zemindar by the raiyats of certain specified villages of the zemindari, Rs. 950 (1,000 *minus* 50, the abovementioned quit-rent). The razi has ever since been acted upon. In 1878 the plaintiff's paternal grandmother, his father and the mother and guardian of his uncle, then a minor, executed a bond for moneys, due by them, mortgaging the right to the Rs. 950 payable annually under the said razi. Some of the instalments of the debt due under the bond having fallen into arrears, original suit No. 15 of 1889, on the file of the Court of the District Munsif of Srivilliputtur, was instituted for the recovery of the amount in arrear and a decree was passed for Rs. 790, with a provision to the effect that the right to the allowance under the razi should be liable to be proceeded against for the amount. The right to receive Rs. 670 out of the allowance (950 *minus* 280 stated to be payable to Vencatasami Maniagar, junior paternal uncle of the male judgment-debtors in the case) was in 1893 put up to sale and knocked down to the decree-holder. The sale was confirmed and a sale certificate was issued to him.

The first point for determination is whether the right to the allowance was incapable of being sold by virtue of clause (*l*) of

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the Hindu law ancestral property of the plaintiff (who was born in the beginning of 1891) and his father, each of them possessed, at the date of the sale, equal interest in the right. So far as the father's share goes the sale cannot, of course, be impeached by the plaintiff. But, notwithstanding that the debt for which the sale took place has not been shown to be an immoral debt, the conclusion to be arrived at in regard to the share of the plaintiff must, I think, be different. Now, as already stated, there was, under the bond on which suit No. 15 of 1889 was brought, a mortgage of the right to the allowance. It involved an interest in immoveable property, the allowance being one charged on the incomes of the villages mentioned in the razi. And the plaintiff, by his birth, became one of the persons entitled to redeem the mortgage. No doubt, if an order absolute had been passed before the right to redeem came to be vested in him jointly with others, the sale would have been binding on him in respect of his share. But the decree passed in 1889 was only a decree *nisi*. It did not even give to the mortgagors, as it should have done, a fixed time within which they were to pay the decree amount. No application for an order absolute was made and no order purporting to be such passed in the case. Assuming that the order which directed the sale of the right to the allowance can properly be treated as an order absolute within the meaning of the provisions of the Transfer of Property Act (see *Siva Pershad Maity* v. *Nundo Lall Kar Mahapatra*, I. L. R., 18 C., 139) still the order does not conclude the plaintiff from questioning what was due under it, inasmuch as he was in existence when it was passed and could have been made a party to the proceeding, but was not. (Compare *Rhambhat* v. *Lakshman Chintaman Mayalay*, I. L. R., 5 B., 630.) The plaintiff must therefore, notwithstanding the sale, be held to be entitled to redeem his right and interest in the subject of the mortgage on payment of his proportion of the debt. According to the admission of the purchaser (appellant) (paragraph 6 of the written statement) the plaintiff's father was entitled to receive Rs. 430 out of the total amount of the allowance. The plaintiff should, therefore, in the absence of evidence to show that the amount payable to him and his father was larger, be taken to be entitled to receive Rs. 215 per annum. He sought, therefore, to have a decree allowing him to redeem to that extent on payment of his portion of the debt, that

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is, $\frac{215}{817}$ thereof, credit being given to him for his share of the sum received by the purchaser from the Zemindar since the sale. I would, therefore, substitute for the decree of the lower Courts a decree to the effect just stated and direct each party to bear his costs throughout.

Davies, J.—It is clear to my mind that the case has proceeded throughout upon the erroneous assumption that what was mortgaged under Exhibit C in 1878 and sold in the court-auction in execution of the decree upon that mortgage was a right to receive Rs. 670 every year for all time out of the annuity or maintenance allowance of Rs. 950 payable yearly to the plaintiff's family under Exhibit E. A reference to the terms of the contract, Exhibit C, will, however, at once show that all that was mortgaged or pledged under it was a right to receive a total sum of Rs. 800 with interest out of the said annuity. The sum of Rs. 800 was borrowed under Exhibit C, and it was stipulated that that sum should be repaid in five annual instalments, the 1st and 2nd instalments being Rs. 100 each and the other three Rs. 200 each, and these several instalments were charged upon the fund of Rs. 950 payable annually to the plaintiff's family. The lien or charge thus extended only to the total sum of Rs. 800 *plus* the interest accruing thereon. The time for repayment of this money expired on the 30th of December 1883, but the debt was evidently not fully discharged by them, for in 1889 the suit (Exhibit A) was brought for the recovery of Rs. 790 still remaining due under the bond C, and a decree was given for that sum with a declaration that the sum of Rs. 800 hypothecated in the bond was liable for the amount of the decree. The right to collect the annuity of Rs. 950, or any part of it every year, is naturally not given by that decree, because no such right had been pledged. In execution of that decree the application, Exhibit B, was made for a sale proclamation in respect of the "right to receive Rs. 670 out of the total of Rs. 950 a year less Rs. 280 payable to Venkatasami Maniagar Avergal, junior paternal uncle of the defendants, which the defendants are entitled to receive from generation to generation under the terms of" Exhibit E, and it is here that the error has crept in, if the words I have quoted are to be taken as meaning the right to receive annually Rs. 670 out of the annual allowance of Rs. 950. But if the words "a year" only relate to the Rs. 950 and not to the

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Rs. 670 also, the true interpretation will be that the Rs. 670 was a lump sum payable once for all out of a particular fund, that is, the annual allowance of Rs. 950. But any doubt upon the subject is cleared up by the sale certificate which plainly shows that the words 'every year' used therein govern only the annuity, the fund out of which the lump sum of Rs. 670 is to be recoverable and do not refer to the Rs. 670. There is no doubt therefore, on the construction of the various documents referred to, that all that was sold was the right to receive a total sum of Rs. 670 chargeable upon a certain fund. That this was so is also proved by the amount fetched at the sale. The decree-holder himself bought in the right for Rs. 1,200, the reason for his paying more than Rs. 670 being that the actual amount due under the decree had reached the sum of the Rs. 1,190 on the date of the sale. If the right to receive Rs. 670 annually for all time out of a well-secured fund had been sold, it would have been worth many years' purchase, and the fact that it did not fetch more than a small fraction of its true value is proof positive that such a right was never sold in the contemplation of any of the parties to the decree or the sale. The further fact that under the decree the right to receive a total sum of Rs. 800 was all that was motgaged and was all that could be sold is another plain indication that nothing more was sold. It would indeed be preposterous to suppose that in order to discharge the decree debt of Rs. 790 the right to receive a secured sum of Rs. 670 per annum for all future time would have been put up for sale. I have therefore no hesitation in finding that all the defendant bought was the right to receive a lump sum of Rs. 670, and that being the case, I must find that the suit of the plaintiff is founded in misconception. He wants a declaration that the sale is not binding upon him and for the recovery of the Rs. 670 which the 4th defendant has received on his purchase. In the view I take of what the sale really was, no question as to its illegality or invalidity can be raised by the plaintiff. His family contracted a debt of Rs. 800, for the repayment of which they pledged their family allowance to that extent, many years before the plaintiff was born or thought of, and it is not open to the plaintiff in any way to object to what his ancestors were capable of doing. The plaintiff cannot, therefore, have a declaration that the sale is not binding on him, nor can he get a decree for the recovery of the sum of Rs. 670 rightly received by the 4th defendant

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who is entitled to keep it as being what he legally purchased in court sale. The only declaration which, in my opinion, the plaintiff is entitled to is declaration that under the sale in question which is sought to be set aside nothing further is recoverable by the purchaser or his representatives. I would, therefore, set aside the decrees of both the Courts below and grant the plaintiff a declaration to the effect above stated, and would further direct the parties to bear their own costs throughout.

Subrahmania Aiyar and *Davies*, JJ.—In view of the difference of opinion between us, neither conclusion being in accordance with that of the lower Courts, we refer the appeal for the decision of another Judge or Judges as the Chief Justice may direct.

This second appeal having, therefore, been referred to the Chief Justice, His Lordship made the following

ORDER :—Under Rule 2 of the High Court I appoint Mr. Justice Shephard to hear and decide the point in question.

This second appeal coming on for re-hearing before their Lordships Mr. Justice *Shephard*, Mr. Justice *Subrahmania Aivar*, and Mr. Justice *Davies* on Monday and Tuesday, the 23rd and 24th January 1899, and the case having stood over for consideration till this day, the Court delivered the following

JUDGMENTS :—*Shephard*, J.—In 1889 the plaintiff's father was indebted to a certain Chetty in respect of a bond under which money was payable by annual instalments "out of the Rs. 950 which we (the executants) annually receive from generation to generation under the razinama, &c." A question is raised as to the construction of this bond as to the nature and extent of the security which it created. In May, 1889, a decree was obtained on this bond against the plaintiff's father. A second question arises upon the construction of this decree. In 1894 application was made for the issue of a proclamation of sale and a question has been raised as to the meaning of the words used by way of description of the property to be sold. A sale ensued and the certificate given to the purchaser who was the decree-holder is another document, as to the construction of which doubts have been raised.

A careful translation of the two last-mentioned documents having been made, I believe we are agreed that the intention was

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to effect a sale outright of the judgment-debtor's right to receive the annuity mentioned in the bond. That is to say, in satisfaction of a claim not exceeding Rs. 1,200, it was intended to sell an annuity, the capital value of which could hardly be less than Rs. 10,000. I suppose it did not occur to the District Munsif or the Pleaders who represented the judgment-debtor that this sacrifice of property could be avoided by the simple expedient of appointing a receiver, and that it did not occur to the officer who conducted the sale to adjourn it and report matters to the District Munsif before knocking down the property to the decree-holder at the absurd price of Rs. 1,200. The case is a striking instance of the manner in which, in consequence of carelessness in the conduct of proceedings after decree, the property of judgment-debtors is sacrificed. Several points were raised on behalf of the plaintiff. In particular it was urged that as he was in existence before the application for sale was made he ought to have been made a party, or had notice of it and could not otherwise be prejudicially affected by the sale. Assuming that the decree directed a sale of the annuity, I do not think the plaintiff, as son of the judgment-debtor, born after the date of the decree but before the sale, could question the sale. As at present advised I see no reason to alter the opinion expressed by me in *Ramasamayyan* v. *Virasami Ayyar*, I. L. R., 21 M., 222; but here the facts are stronger, because before the birth of the son the mortgage had been executed for a pre-existing debt and *ex hypothesi* a decree for sale had been passed. Under these circumstances, I think it is impossible to hold that any right of redemption is left to the plaintiff. The question remains whether in reality there was a decree for sale, and whether if there was no such decree the actual sale has any efficacy as against the plaintiff. There have certainly been instances in which decrees, somewhat similar to the present in language, have been treated as decrees for sale. It may have been right at a time when the provisions of the Transfer of Property Act were novel and unfamiliar to the Courts to put an indulgent construction on their decrees. But the decree in the present case was made as late as May 1889, and the wording of it is singularly defective if the intention of the Court was that a sale of the annuity should take place. The elements which are requisite to make a proper decree for sale at the suit of a mortgagee are wholly wanting. There is not a word about sale in the decree, no time for payment is given, and even the desig-

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nation of the property is obscure. The decree rather resembles a decree declaring a charge. I see no reason for putting on it an interpretation favourable to the party whose business it was to see that he got a proper decree.

From the petition, in pursuance of which the proclamation was issued, it does not appear whether the property sold had been attached or not. But the proclamation itself refers to the attachment. It was attached property that was advertised for sale. This is consistent with the view that the decree was not treated as a decree for sale. The case thus being one of attached property sold at the instance of the mortgagee in execution of a money-decree is clearly within the mischief at which Section 99 of the Transfer of Property Act was aimed. It may be that the deed of hypothecation and the plaint would have justified a decree for sale. That, I think, it is unnecessary to consider. It appears to me that the conditions under which according to S. 99 the sale of mortgaged property is permissible are not satisfied, unless there is a decree for sale, and that in the absence of such decree the sale is prohibited (*Chundra Nath Dey* v. *Burroda Shoondury Ghose,* I. L. R., 22 C., 814). It follows that the sale of October 1893 was made in contravention of the law. It is argued that any such objection ought to have been raised as a question relating to the execution of the decree and could not be made the subject of a separate suit. The object of the section, no doubt, was to prevent the confusion and uncertainty which arose in cases in which mortgaged property was put up for sale by the mortgagee in execution of a decree for money. The cases reported before the Act came into force shew what complications could arise in cases in which there were several mortgages of the same property, or the property was sold at execution sales more than once. The Courts were not agreed as to the position of the purchaser as against incumbrancers subsequent to the one who had caused the property to be sold (see cases collected in Macpherson on Mortgages, p. 482, and see Commissioners' report, page 35, and Introduction to the Act in Stokes' Anglo-Indian Codes, Substantive Law). Moreover, the practice of selling mortgaged property otherwise than under a mortgage-decree was open to the objection that it deprived the mortgagor of his rightful privileges regarding the equity of redemption

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(*Martand* v. *Dhondo* I. L. R., 22 B., 628). The remedy devised by the Legislature was to insist on the mortgagee bringing a mortgage suit, in which all persons interested in the property should be joined, as a condition precedent to any sale by the Court of the mortgaged property. Such being the purpose of the Legislature, I think it is clear that, although a sale in contravention of the section is not absolutely void for all purposes, it is at least void against all persons who were not parties to the suit in which the decree for money was obtained. It was for their benefit as much as for that of the mortgagor himself that the section was enacted and they could not be prejudiced by any waiver on his part. In several cases decided in this Court it has been considered that the section has the effect of invalidating a sale as against persons, who, while not parties to the decree, would otherwise be bound by it (*Sathurayyan* v. *Muthusami*, I. L. R., 12 M., 325; *Durgayya* v. *Anantha, Ib.* 14 M., 74; *Vigneswara* v. *Bapayya, Ib.* 16 M., 436). In those cases no reference is made to S. 244 of the Civil Procedure Code; but in a more recent Bombay case, where that section must have been present to the mind of the Court, it was also held that the plaintiff, a member of the mortgagor's family bound by the decree obtained against the manager, was, notwithstanding the sale of the property and purchase by the mortgagee, entitled to assert his right of redemption (*Martand* v. *Dhondo*, I. L. R., 22 B., 624). According to the judgment of *Farran*, C. J., it would be correct to say that the effect of the section was to preserve the right of redemption to a person, circumstanced as the plaintiff was in that case, in the same way as it is preserved to a person interested in the equity of redemption who is not made party to a suit in other respects properly instituted under S. 67 of the Transfer of Property Act, and is not, as the member of a Hindu family, bound by the decree made against the father or manager. The rights of the Hindu debtor's son may be concluded by a proper mortgage-decree and sale thereunder, or, if there is no mortgage, by a decree for money and sale of the attached property, but they are not affected by a sale brought about in defiance of S. 99. In this view of the law it seems clear that it cannot rightly be said that the present suit is barred by the provisions of S. 244 of the Code.

To hold that the plaintiff is precluded from bringing a suit because his father might have taken the objection in the course of

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the execution of the decree would be to defeat one of the main objects of S. 99, and it is not explained how, in the circumstances of this case, it would have been legally possible for the plaintiff to intervene.

For these reasons, I think the appeal must be allowed except to the extent of the plaintiff's share. I agree to the terms of the decree proposed by Mr. Justice *Subrahmania Aiyar.*

Subrahmania Aiyar, J.—Nothing put forward on behalf of the appellant at the second argument in this case has led me to change the view that the suit fails even with regard to the 1st respondent's share of the annuity. As to that share, though what was urged on behalf of the appellant convinces me that the reasons given in my former judgment for the conclusion that the said respondent is entitled to redeem the share are not sustainable, yet the conclusion itself is sustainable for the reasons stated in the judgment of my learned colleague, *Shephard,* J. I agree, therefore, that the appeal be allowed and the suit dismissed except as to the 1st respondent's share, and that as to that share the respondent should have a decree for redemption on the terms stated in my previous judgment, the costs being borne by each party throughout.

Time for redemption will be six months from this date.

Davies, J.—At the re-hearing of this appeal, amended and correct translations of the application for sale and the sale certificate were put in, and from these it is clear that what was actually sold (however irregularly) was the annually recurring right to receive Rs. 670. My former judgment must therefore be cancelled, and I now concur in the conclusion of my learned colleagues.

The time for redemption should be on the day three months from date of our judgment.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Moore.

Appammanayuralu and others ... Appellants* (*Defendants*)

v.

Ramanna ... ... Respondent (*Plaintiff*).

Appamma-nayuralu. *v.* Ramanna.

Evidence—Unregistered receipt, admissibility of, in proof of discharge—Secondary evidence of payment.

Even though a receipt may have the effect in law of extinguishing a mortgage, it is primarily only evidence of payment and need not be registered in order to be admissible in evidence.

Where a document purporting to extinguish a mortgage is, for want of registration, inadmissible as proof of such extinguishment, it is still admissible as evidence of payment.

Oral evidence may be adduced in proof of payment though a receipt alleged to have been given for it is not produced in Court.

Second appeal from the decree of the District Court of Vizagapatam in A. S. No. 347 of 1895, reversing the decree of the District Munsif's Court of Rajahmundry in O. S. 390 of 1894.

In 1888 two persons, Veerarajulu and Varahalu mortgaged two items of property to the plaintiff under two mortgage deeds, one for Rs. 1,500 and the other for Rs. 200. Each of the mortgagors had a moiety in each of the two items of lands. In 1889 Veerarajulu sold half of his moiety to the plaintiff and Varahalu mortgaged half of his share to the plaintiff. Plaintiff, however, retained the other half of Varahalu as security for the balance still due on the mortgages of 1888. The balance amounted to about Rs. 1,000. The plaintiff's case is that the defendant agreed to pay this Rs. 1,000 to plaintiff and took a conveyance of the other half of Veerarajulu and a mortgage of the remaining share of Varahalu. Thus the plaintiff and the defendant each possessed one-half of Veerarajulu's share and had a mortgage of one-half of Varahalu's share. The plaintiff alleging that the defendant had not paid to him the sum of Rs. 1,000 due on the mortgages of 1888, brought

* S. A. No. 1111 of 1897. 3rd March 1899.

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this suit to recover with mesne profits the one-half of the lands of which the defendant had taken possession without paying the money due. The defence was that the money due on the mortgages of 1888 had been discharged and that the plaintiff could not maintain a suit to recover the lands. In proof of the plea of discharge the defendant filed a receipt, Exhibit VI, and was also prepared to let in oral evidence of payment. The District Munsif thought that Exhibit VI was inadmissible for want of registration and that no oral evidence could be admitted to prove the contents of the document. However, on an examination of the conduct of the parties and the other circumstances in the case he was of opinion that the mortgages of 1888 had been satisfied and that at all events he could only sue for the money and not for possession of the lands. The plaintiff appealed. The District Judge decided that in the absence of any evidence to prove payment he should hold that discharge was not proved and that since the defendant has failed to perform his part of the contract and pay Rs. 1,000 to plaintiff, he (the plaintiff) was entitled to recover the lands which were put in possession of the defendant only in consideration of his undertaking to pay Rs. 1,000 to plaintiff. Hence this appeal by the defendant, mainly on the ground that the Courts below were wrong in rejecting evidence of payment.

N. Subrahmaniam and *Joseph Satya Nadar* for 2nd and 3rd appellants.

C. R. Pattabhirama Aiyar for respondent.

The Court delivered the following

JUDGMENT :—The question is whether the payment evidenced by the receipt, Exhibit VI, is true. The lower Courts were clearly in error in holding that the Exhibit was not receivable in evidence of the payment therein recited. The instrument does not in our opinion purport to extinguish the mortgage right. Even if it did, the document is receivable as evidence of the payment and oral evidence also was of course admissible. The lower Courts, however, refused to receive oral evidence. The refusal to admit the evidence on the point clearly affected the decision of the case in the lower appellate Court which proceeds entirely upon the absence of any evidence in support of the payment pleaded. We must, therefore, set aside the

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decree of both the Courts and remand the suit for disposal according to law.

The costs of this appeal and the costs in the lower appellate Court will abide and follow the result.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Shephard and Mr. Justice Benson.

Govindan Nair ... Appellant* (*1st Defendant*)

Cheruli Achan and others ... Respondents (*Plaintiff and Defendants 2 and 3 and Plaintiff's represetative*).

Govindan Nair v. Cheruli Achan.

Practice—Reversal of judgment by the appellate court—Reasons for the decision.

A court of appeal cannot reverse the judgment of the lower court on mere suspicion of its incorrectness, without positively satisfying itself that the decision is wrong.

Second appeal from the decree of the Subordinate Judge's Court of South Malabar at Calicut in A. S. No. 869 of 1896, reversing the decree of the Court of the District Munsif of Chowghat in O. S. No. 510 of 1895.

This was a suit to declare that a kanom deed alleged to have been executed by plaintiff and defendants 2 and 3 in favour of the 1st defendant on the 12th June 1894 was a forgery and was not binding upon the plaintiff. The 1st defendant contended that the deed was genuine and the other two defendants supported his case. The only issue in the case was whether the document was executed by the plaintiff. The District Munsif held that the deed was genuine and dismissed the plaintiff's suit. The District Judge on appeal recited the various suspicious circumstances in the case and thus wound up his judgment: "On the whole I am of opinion that there are circumstances which raise great suspicion in this case and that the plaintiff is entitled to the declaration sued for. This appeal is therefore allowed with costs." Hence this second appeal.

P. R. Sundara Aiyar for appellant.

P. K. Nambyar and *T. M. Appu Nedungadi* for 4th respondent.

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* S. A. No. 1459 of 1897 7th March 1899.

Govindan Nair v. Cheruli Achan.

The Court made the following

ORDER:—The judgment is not sufficiently explicit. Before the Subordinate Judge as an appellate court could reverse the decision of the District Munsif, he was bound to satisfy himself that that decision was wrong. It was not enough for him to think that there were circumstances raising suspicion. Not only was the onus of proof on the plaintiff, but there was a decision against him.

As the Subordinate Judge has not arrived at a distinct finding, we must ask the present Subordinate Judge to find clearly whether the document is a forgery.

The finding should be submitted within one month from the date of receipt of this order and seven days will be allowed for filing objections after the finding has been posted up in this Court.

[In compliance with the above order, the Subordinate Judge submitted his finding to the effect that the document was a forgery.]

Thereupon the Court delivered.

JUDGMENT:—We accept the finding and dismiss the appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Davies.

Krishnaswami Konan ... ... Appellant* (*Defendant*)

v.

Ramaswami Aiyar ... ... Respondent (*Plaintiff*).

Krishnaswami Konan v. Ramaswami Aiyar.

Hindu Law—Personal debt of the father—Decree—Execution against divided son—Son's liability.

Under the Hindu Law, a decree obtained against the father cannot be executed against property in the hands of a divided son, unless it can be proved that the partition was made with a view to defraud or delay the creditors.

Second appeal from the District Court of Trichinopoly in A. S. No. 21 of 1896, reversing the decision of the District Munsif of Srirangam in O. S. No. 151 of 1895.

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* S. A. No. 825 of 1898. 27th February 1899.

Krishnaswami Konan v. Ramaswami Aiyar.

In the year 1891 the plaintiff's father executed to the plaintiff a document purporting to be a partition deed by which it was provided that the plaintiff was to take the whole of the property and pay the debts, a list of which was inserted in the deed. Subsequently, the defendant brought a suit for the recovery of a debt not mentioned in the list of debts in the partition deed, obtained a decree and sought to execute it against a house in the possession of the son. The plaintiff put in a petition stating that the house had fallen to his share on partition and that the decree against his father could not be executed against his property. This petition was rejected. Hence this suit for a declaration that the house was his property and that it was not liable to be attached and sold in execution of the defendant's decree. The defendant pleaded that the partition was fraudulent and the property in the hands of the son was liable for the father's debt.

The District Munsif found that the partition was true and *bonâ fide*, that the son was liable for the debt of the father and that the deed, whether viewed as a partition deed or as a deed of gift could not avail against a creditor who was in no way party to the transaction. He, therefore, refused to make the declaration asked for by the plaintiff. On appeal the District Judge held that the property in the hands of a divided son could not be made liable for a money-decree against the father and that even supposing that the document was a deed of gift and the son was liable under S. 128 of the Transfer of Property Act, the liability could be enforced only by a suit against the son and not in execution of the decree against the father. He, therefore, reversed the decree of the lower Court and declared that the decree could not be executed against the property in his hands. Hence this second appeal.

T. Rangachariar for appellant.

T. V. Seshagiri Aiyar for respondent.

The Court delivered the following

JUDGMENT:—The principle upon which the son cannot object to ancestral property being seized in execution for an unsecured personal debt of the father is that the father under the Hindu Law is entitled to sell on account of such debt the whole of the ancestral estate. This necessarily implies that at the time the

property is seized it remains the undivided estate of the father and the son. If the estate were divided, the father could not sell what did not fall to him in the division.' Krishnaswami Konan v. Ramaswami Aiyar.

Ergo—property taken by the son in partition cannot be seized on account of such unsecured personal debt of the father even though the debt had been incurred before the partition. Of course if the partition had been made with a view to defraud or delay creditors it would be otherwise. But no such case is made out here. On this ground we confirm the decree of the lower appellate Court and dismiss the second appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Arthur Collins, *Kt.*, Chief Justice, and Mr. Justice Shephard.

Machiraju ... ... Appellant * (*Plaintiff*)

v.

Simhachalam and others ... ... Respondents (*Defendants*).

Hindu Law—Joint undivided family—Exclusion—Adverse possession—Burden of proof—Exclusion, what amounts to. Machiraju v. Simhachalam

When a member of a joint undivided Hindu family is refused a share of the family property on the ground that he has been excluded from its enjoyment for more than the statutory period, the *onus* of proving exclusion is on him who sets it up and mere absence elsewhere is not sufficient proof of such exclusion.

Second appeal from the decree of the District Court of Godavari in A. S. No. 270 of 1896, affirming the decree of the Court of the District Munsif of Narasapur in O. S. No. 399 of 1895.

This was a suit for partition and for the recovery of a half share of the lands, houses, &c., situated in the village of Vundi and Bhimavaram together with profits, past and future, and costs. The allegation in the plaint was that the plaintiff and 1st defendant were undivided brothers, that their property was joint though they were living away from each other for a long time, and that notwithstanding the constant demands of the plaintiff, the 1st defendant was evading division and delivery of a half share to the plaintiff.

* S. A. No. 1652 of 1897. 11th November 1898.

[Machiraju v. Simhachalam The defendants on the other hand stated that they had long been divided, that some of the suit lands fell to their share on partition, that the major portion of them was their self-acquisition, that the plaintiff had been excluded from participation of the profits of the family for 30 years and that, therefore, the suit was barred by limitation.

The District Munsif found that the two brothers had long previous to the date of suit divided the family properties, that all except a very small portion of the suit lands were the self-acquisition of the 1st defendant and that the suit was barred by limitation. As to the question of exclusion there was no clear evidence either way. But the District Munsif held that the *onus* was on the plaintiff to prove that he was not excluded from participation in the profits and that he had not discharged that *onus*. He, therefore, dismissed the plaintiff's suit. On appeal, the District Judge without entering into the question of division or self-acquisition contented himself with saying that he agreed with the decision of the District Munsif on the question of the *onus* and that the plaintiff having failed to prove non-exclusion from profits, the suit must be held to be barred by limitation. Hence this second appeal.

V. C. Seshachariar for appellant.

T. V. Seshagiri Aiyar for 1st to 4th respondents.

The Court delivered the following

JUDGMENT:—There appears to be no evidence on the defendants' side of anything which can be called exclusion of the plaintiff. The Judge considers that the plaintiff must, in view of his long absence, prove his participation in the profits of the ancestral property. We do not think this is law. The burden of proving the exclusion is on the person who alleges that fact and absence standing by itself is, in our opinion, insufficient. We must reverse the decree and remand the appeal. The appellant must have his costs of this appeal.

Other costs will be dealt with in the revised decree.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Arthur Collins, Kt., Chief Justice, and Mr. Justice Benson.

Muhamod ... ... Appellant* (3rd *Defendant*)

v.

Ayyappan and others... ... ... Respondents (1 to 3 *Plaintiffs* and 2*nd Defendant*).

Limitation Act, Art. 11—Claim under S. 335, C. P. C.—Rejection—Regular suit—Period of limitation. Muhamod *v.* Ayyappan.

Where a claim under S. 335, C. P. C., has been disallowed by the court, a regular suit to set aside the order and to establish the right of the claimants is governed by Art. 11 of the Limitation Act, and must be brought within one year from the date of the order.

Second appeal from the decree of the Subordinate Judge's Court of South Malabar at Calicut in A. S. No. 407 of 1897 modifying the decree of the Court of the District Munsif of Kutnad in O. S. No. 47 of 1896.

The facts of the case are shortly these. The plaint properties were jointly acquired by three persons, *viz.*, the father of the 2nd defendant, the father of the 1st and 2nd plaintiffs and the husband of the 3rd plaintiff. The 1st defendant in this case brought a suit, O. S. No. 247 of 1889, against the 2nd defendant and obtained a decree, in execution of which the plaint properties were put up for sale and purchased by one Nurdin Kuti. This purchaser was put in possession of the properties, notwithstanding the objections of the present plaintiffs who claimed to be entitled to two-thirds of the properties. Thereupon the plaintiffs brought a suit, O. S. No. 343 of 1893, against the said Nurdin Kuti, the auction-purchaser, to recover two-thirds of the properties purchased by him; and this suit was decreed in favour of the plaintiffs in the 1st court. On appeal the District Judge held that the suit was really one for partition, that the 2nd defendant as co-parcener was a necessary party to the suit, and that it would not do to say that the 1st defendant who had by purchase in execution stepped into the shoes of the 2nd defendant sufficiently represented him for the purposes

* S. A. No. 3238 of 1897. 13th December 1898.

Muhamod v. Ayyappan.

of that suit. He, therefore, dismissed the plaintiffs' suit. Against this decision the plaintiffs did not appeal. They now brought this suit for a declaration that the plaintiffs were entitled to two-thirds of the properties sold in execution of the decree in O. S. No. 247 of 1889, and that the order disallowing the plaintiffs' claim was invalid and for the recovery of their two-thirds share together with mesne profits.

The District Munsif dismissed this suit on two preliminary grounds—

(1) "This suit was *res judicata,* because if the suit, O. S. No. 343 of 1893, was maintainable, they ought to have appealed against the decision of the District Judge that the suit was not maintainable without impleading the 2nd defendant as a party to the suit for partition; and if the suit was really not maintainable in that form, it was their own fault that they did not bring the suit in a sustainable form".

(2) "The suit was also barred by limitation, because the order passed by the executing court refusing to allow the plaintiffs' claim was passed more than one year before the date of the present suit [*Achuta* v. *Mammavu,* I. L. R., 10 M., 357; *T. K. Ummatha* v. *T. K. Cheria Kunhamed, Ib.* 4 M., 308; and *Velayuthan* v. *Lakshmana, Ib.* 8 M., 506]".

On appeal from this dismissal the District Judge reversed the District Munsif's decision on both the points and remanded the case for disposal according to law. On the first point, the Judge held there was no *res judicata,* because the previous suit, O. S. No. 343 of 1893, was disposed of, not on the merits, but for a technical defect in the frame of the suit. On the second point, he held that the summary order which was apparently under S. 335, C. P. C., related only to the right to the then possession of the properties, but could not affect a subsequent regular suit for possession [*Sevu* v. *Muttusami, Ib.* 10 M., 53].

On remand the District Munsif decreed to the plaintiffs two-thirds of the properties and also mesne profits. On appeal the Subordinate Judge confirmed the decision with a slight modification as to mesne profits. Hence this second appeal.

K. V. Karunakara Menon for appellant. Muhamod v. Ayyappan.

T. M. Appu Nedungadi for 1st and 2nd respondents.

The Court delivered the following

JUDGMENT:—We cannot agree with the District Judge that the present suit is on all fours with the case of *Sevu* v. *Muttusami*, I. L. R., 10 M., 53, on which he relies.

The case of *Achuta* v. *Mammavu*, I. L. R., 10 M., 357, to which the District Munsif has referred is, however, a clear authority for holding that the present suit is barred by Art. 11 of Sch. 2 of the Indian Limitation Act.

We must, therefore, set aside the decree of the lower appellate Court and restore the original decree of the District Munsif with throughout for appellant.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Moore.

Mutyala Naraiya ... ... Appellant* (*Plaintiff*)

v.

Boda Seshaiya and another ... ... Respondents (*Defendants*).

Mutyala Naraiya v. Boda Seshaiya.

Limitation Act; Art. 23—Malicious prosecution—Suit for damages—Starting point of limitation—Acquittal—Application for revision—Order thereon.

Under Art. 23 of the Schedule to the Limitation Act a suit for damages for malicious prosecution should be brought within one year from the date of acquittal; and when a revision petition is preferred and dismissed, there is no fresh starting point and limitation will not commence afresh.

Second appeal from the decree of the Sub-Judge's Court of Coconada in A. S. No. 159 of 1897 reversing the decree of the District Munsif of Peddapur in O. S. No. 241 of 1896.

The plaintiff brought this suit to recover damages for malicious prosecution. The defendant *inter alia* contended that the suit was barred by limitation. The criminal prosecution terminated in the plaintiff's favour on the 2nd of July 1895, and this suit was

* S. A. No. 979 of 1898. 3rd March 1899.

Mutyala Naraiya v. Boda Seshaiya.

filed on the 20th of July 1896. But soon after the date of the acquittal a revision petition was filed, and it was dismissed in September 1895. On the question of limitation it was contended for the plaintiff that, though the prosecution terminated in plaintiff's favour on the 2nd of July, 1895, the matter became *sub judice* when the revision petition was filed, that, though "the plaintiff was acquitted" on the 2nd of July, "the prosecution was otherwise terminated" in September, that, therefore, under Art. 23 limitation began to run only from September, and the suit was not barred. The Munsif decided in favour of the correctness of these contentions and gave damages to the extent of Rs. 100. On appeal, the Subordinate Judge held that the clause "when the prosecution is otherwise terminated" in the 3rd column of Art. 23 referred to cases of re-opening of acquittals on appeals, but that an order on revision confirming the acquittal could hardly have been in the contemplation of that clause since there was no time fixed for filing revision and since it might be preferred even after the lapse of one year from acquittal. He, therefore, dismissed the plaintiff's suit. Hence this second appeal.

P. S. Sivaswami Aiyar for appellant.

P. Anandacharlu for respondent.

The Court delivered the following

JUDGMENT:—The Subordinate Judge's view that limitation began to run from the time the appellant was acquitted is, in our opinion, right. No appeal against that acquittal was preferred by the Government, and it is, therefore, unnecessary to consider when limitation would have begun to run if an appeal against the acquittal had been preferred. We cannot agree with the contention on behalf of the appellant that on this respondent moving the District Magistrate to make a reference to the High Court with reference to the acquittal, the order acquitting the appellant had ceased to be final and the prosecution should be treated as one which had not been terminated within the meaning of Art. 23 of the Limitation Act.

The second appeal fails and is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Arthur Collins, *Kt.*, Chief Justice, and Mr. Justice Benson.

Naina Mahomed Rowthar ... ... Petitioner* (*Plaintiff*)

v.

Mahomed Husain Rowthar ... ... Respondent (*Defendant*).

Naina Mahomed Rowthar *v.* Mahomed Husain Rowthar.

Indian Stamp Act I of 1879, Ss. 5, 18 and 34—Promissory note—Foreign instrument—Stamp, want of—Admissibility in evidence.

Except as provided by Ss. 5 and 18 of the Stamp Act, a foreign promissory note need not be stamped and is admissible in evidence without being so stamped.

Petition under S. 25 of Act IX of 1887 praying the High Court to revise the decree of the Court of the District Munsif of Mannargudi in small cause suit No. 226 of 1898.

This was a suit for Rs. 36-2-0 due on what purports to be a *hundi*, dated the 24th January 1897, alleged to have been executed by the defendant to the plaintiff at Penang. The defendant admitted having executed the document but denied having received any money thereunder. It was also contended that the document was not a *hundi* but a promissory note, and that it was inadmissible for want of stamp. The District Munsif found against the plea of 'no consideration,' but held that the document was really a promissory note, and not having been properly stamped was inadmissible in evidence under S. 34 of the Stamp Act. Hence this revision petition on the grounds that the document was not a hundi or promissory note but a bond or contract in writing admissible in evidence on payment of the penalty prescribed by S. 34 of the Stamp Act, and that even if it were a promissory note, being a foreign instrument, it was admissible in evidence, notwithstanding the provisions of S. 34 which applied only to inland instruments.

T. Natesaiyar for petitioner.

Respondent was not represented.

The Court delivered the following

JUDGMENT :—The instrument sued on is clearly a promissory note. It was executed out of British India, and under S. 11 of the Indian Stamp Act I of 1879 it must be deemed to be unstamped, inasmuch as the one-anna adhesive stamp on it was not cancelled.

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* C. R. P. No. 344 of 1898. 17th January 1899.

Naina Mahomed Rowthar v. Mahomed Husain Rowthar.

The District Munsif refused to receive the document in evidence on the ground that it was not duly stamped, and could not be stamped on payment of penalty, or be admitted in evidence under S. 34 of the Stamp Act, and he, therefore, dismissed the suit.

We think that the District Munsif was in error in holding that S. 34 rendered the document inadmissible in evidence. That section only applies to an instrument which is "chargeable with duty," but there is no provision of law which requires a pro-note executed out of British India to be stamped before it is sued on or used in Court.

Section 5 of the Act requires every such pro-note to be stamped if it is "accepted, or paid or presented for acceptance or payment, or endorsed, transferred or otherwise negotiated in British India," and S. 18 requires the first holder in British India to affix the proper stamp and cancel the same before he presents it for acceptance or payment, or endorses, transfers or otherwise negotiates the same in British India. But in this case the holder has not done any of those things, and consequently the obligation to stamp the pro-note has not arisen, and S. 34 is no bar to its admission as evidence.

The same view of the law was lately taken in a very similar case by *Shephard*, J., in C. R. P. No. 375 of 1897 (unreported, following the case of *Griffin* v. *Weatherby*, L. R. 3 Q. B. 753).

We must, therefore, set aside the decree of the District Munsif, and, as the District Munsif has found against the defendant's plea that there was consideration for the note, we give judgment for plaintiff for the amount sued for with costs throughout.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Moore.

Veera Pillai ... ... Appellant* (1st Plaintiff)

v.

Poonnambala Pillai and others ... Respondents (*Defendants*).

Exchange—Construction—Covenant—Condition subsequent—Limitation Act, Art. 113 —Transfer of Property Act, S. 119. **Veera Pillai v. Poonnambala Pillai.**

[*Obiter*: Per *Subrahmania Aiyar*, J.:—Where a party to an exchange loses a portion of the lands he got on exchange and seeks to avail himself of the covenant implied by law under S. 119 of the Transfer of Property Act, he cannot recover an equivalent portion of the lands he gave, but must set side the whole transaction and claim to be placed in the position in which he was before the exchange].

Where the parties to an exchange of lands agreed that "should any objection arise with reference thereto, equivalent land should be given back":—

Held, that the agreement constituted a covenant and not a provision for re-entry on the happening of a condition subsequent;

that, therefore, a suit for the recovery of equivalent land fell under Art. 113 of the Limitation Act:

and that the suit not having been brought within three years from the date of the eviction was barred by limitation.

Second appeal from the decree of the District Court of Tanjore in A. S. No. 804 of 1897, reversing the decree of the Court of the District Munsif of Shiyali in O. S. No. 244 of 1896.

The facts so far as they are necessary for the purposes of this report are clear from the judgment of *Subrahmania Aiyar*, J.

P. R. Sundara Aiyar for appellant.

T. Narasimha Aiyangar for *R. Shadagosachariar* for respondents.

The Court delivered the following

JUDGMENT:—*Subrahmania Aiyar*, J.:—The dispute in this case relates partly to a portion of the land specified in schedule A and partly to some of the lands specified in schedule C annexed to the plaint. So far as the latter lands go, the finding of the District Judge is against the plaintiff (appellant) and being a finding of

* S. A. 973 of 1898. 7th April 1899.

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the District Judge is against the plaintiff (appellant), and being a finding of fact it must be accepted.

As regards the land included in schedule A, the case of the plaintiffs is that the land formerly belonged to them and was given to certain persons, through whom the defendants claim, in exchange for land received by the plaintiffs from those persons; that subsequently in April 1884, the plaintiffs were evicted, from about 75 kulies of what they had got in the exchange, by parties who were shewn to possess a paramount title thereto; and that the plaintiffs are therefore entitled to recover an equal extent out of the land mentioned in the schedule A in question.

This claim was not, as suggested in the course of the argument before us on behalf of the plaintiff, based on the condition which, in the absence of a contract, the law annexes to a transaction of exchange and which gives to either party to the transaction a right to re-enter, in certain circumstances, upon the property given by him in exchange. Now, of that condition a party can no doubt avail himself when he has been evicted even from a portion of the property received by him in exchange. In doing so, however, he must put an end to the transaction as a whole so as to be placed in the position he was before the exchange; but not as in this case where the party seeks to recover only a portion of what he had given in exchange (see *Bustard's* case 4 Coke, 121) and that too a portion not defined and determined at the time of the transaction.

The claim of the plaintiffs was based in the plaint on an express arrangement which, if true, excludes the condition that would otherwise be implied by law. That arrangement—an oral one—is set out in the plaint thus:—"not only was the said exchange made with due regard to the similarity between and the equivalence of the respective plots but also upon the arrangement that should any objection arise with reference thereto, equivalent land should be given back."

The District Munsif, without entering into the truth of the exchange alleged or the terms thereof, construed the above averment as one of a mere contract specifically enforceable and held that, as it was admitted in the plaint that though in 1884, immediately after the plaintiffs were evicted from the 75 kulies, they

called upon the defendants to make good the deficiency, the latter did not do so, the present part of the suit was barred under Art. 113 of the Limitation Act.

In the memorandum of appeal put in by the plaintiffs in the District Court, objection was taken to the above conclusion of the District Munsif. But, as in the judgment of the lower appellate Court, no allusion is made to the point it is doubtful whether it was pressed at the argument before that Court. However this may be, the question is whether the District Munsif's view is correct.

In the argument before us, the learned vakil for the plaintiff contended that the averment referred to above ought to have been held to be an averment of a condition which gave the plaintiffs a title to re-enter upon so much of the land in schedule A as is equivalent to what had been taken away from them, that they could sue within 12 years from the time they became entitled to re-enter and that the suit having been instituted within that period, was not barred by the law of limitation.

Now, it is no doubt open to the parties to a grant to insert any provision therein which shall have the effect of a condition. But whether in a particular case a provision is a covenant or a condition is of course a question as to the intention of the parties, to be ascertained from the language used by them. The leaning of the Courts, however, is against construing a provision as a *condition subsequent* if that construction can fairly be avoided.

For conditions of that description tend to destroy estates and to hamper the free transfer thereof. "Such conditions", in the words of an authority usually cited on the point, "annexed to estates as go in defeasance and tend to the destruction of estates being odious in the law are taken (that is construed or expounded) strictly and shall not be extended beyond the words unless it be in some special cases." (Shep. Touch. 133). Chancellor Kent, in his commentaries, referring to the same matter observes: "Conditions subsequent are not favoured in law and are construed strictly because they tend to destroy estates; and the rigorous exaction of them is a species *summum jus,* and in many cases hardly reconcilable with conscience". (Vol. 4, 13 Edn., p. 138). The learned author in a later passage points out that such conditions are not readily to be raised by mere inference and argument (*Ib.* 142). It may be added that the leaning against construing as conditions subsequent is strongest in the case of transactions entered into for valuable

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consideration, and there are decisions which show that this leaning is carried so far that even in the case of written instruments, clear language such as "upon the express condition," &c., does not by itself make it absolutely obligatory on the courts to construe the provision as a condition subsequent if from the general tenor of the instrument or other circumstances a different construction is justifiable. It is, therefore, scarcely necessary to say that one cannot lightly accept the suggestion now made for the plaintiff especially as the alleged transaction is said to have been entered into many years ago by mere word of mouth and is brought forward as against persons who were admittedly not parties to the transaction, in order to eject them from the land held by them for nearly 20 years. Further, turning to the averment itself it is to be observed that it leaves in doubt the rather important matter whether the party evicted is to have the deficiency made good out of what he had *given* in exchange or from any other like property that the party who becomes accountable might possess at the time he has to make the reparation. Granting, however, for argument that the reparation was to be made out of the identical land originally transferred by the party entitled to such reparation, still the particular part or parcel of the land equivalent to the portion lost has to be selected and fixed either by mutual consent or by judicial determination before possession thereof can be taken by the party entitled. If the plaintiff's present contention is to prevail, it would involve the view that even before the abovementioned essential preliminary is completed, the party entitled to the reparation can re-enter upon the whole land as if he were a tenant-in-common with the other party in possession under the exchange. There is no authority for adopting such a view. The better conclusion would be to hold that an understanding to the effect stated in the plaint confers only a right to compel on the happening of certain contingency the parties concerned to separate out of specified lands vested in them so much as might be required to compensate the party who has lost by the happening of that contingency and to put the latter in possession of the same. In short such an understanding constitued a *covenant* and nothing more. Compare *Doe dem. Willson* v. *Phillips,* 2 Bing., 13).

The decision of the lower Courts is right.

The second appeal fails and must be dismissed with costs.

Moore, J.:—I concur.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Subrahmania Aiyar and Mr. Justice Moore.

Adaikalam Katha Nadan and others... Appellants* (*Plaintiffs*),

v.

Kandasamia Pillai ... ... Respondent (*4th Defendant*).

Inam lands—Enfranchisement—Adverse possession—Limitation.

The Government can enfranchise an inam land so as to confer a valid title on the Inamdar, unless any other person has acquired a right to it by adverse possession for more than 60 years. Adaikalam Katha Nadan v. Kandasamia Pillai.

Second appeal from the decree of the District Court in A. S. No. 94 of 1897, reversing the decree of the Court of the District Munsif of Srivilliputtur in O. S. No. 213 of 1896.

The plaintiffs brought the suit for the cancellation of an order rejecting the plaintiffs' claim to the plaint properties, for a declaration that the plaintiffs were the owners of the land, and that the 1st defendant was entitled only to a *tirva* of Rs. 3 per annum and for the recovery of the lands together with mesne profits. The facts of the case as stated by the plaintiffs are as follows :—The plaintiffs' grandfather and his brothers brought the lands under cultivation and were in enjoyment of the same till 1874 when they mortgaged them with possession to certain persons who are in no way concerned in this suit. The lands were redeemed in 1888, and from 1889 when they fell to the share of the plaintiffs on a partition of the family properties they were in plaintiffs' possession and enjoyment. The 1st defendant who was entitled only to the *tirva* as emoluments attached to the office of *nottam manibakkar*, hypothecated the lands to his nephew, the 4th defendant, as though the lands were his own and suffered a decree to be passed against him in O. S. No. 18 of 1892, in execution of which the 4th defendant purchased the land and was put in possession of them, notwithstanding the objections of the plaintiffs. It was against this order, dated 27th January 1896, refusing to allow the plaintiffs' claim that the plaintiffs brought this suit.

* S. A. No. 1175 of 1898. 9th March 1899.

Adaikalam Katha Nadan *v.* Kandasamia Pillai.

The defendants, on the other hand, denied the plaintiffs' title to, and enjoyment of, the suit lands and stated that the lands themselves, and not alone the tirva, formed the inam attached to the office of *nottam manibakkar,* and that the suit was barred by limitation.

The District Munsif on a consideration of the evidence in the case decided that the plaintiffs were the owners of the lands and the 1st defendant was entitled only to the *tirva,* that therefore the 4th defendant had acquired no right to the lands by his purchase in execution sale, that the suit was not barred by limitation since according to his finding the plaintiffs' mortgagees were in possession of the properties till the year 1888 and that the plaintiffs were entitled to a decree for the lands and mesne profits. On appeal the District Judge held that from the records of the Government it was clear that the lands themselves formed the inam, that under Regulation VI of 1831 no alienation could be made of inam lands and no title could be acquired by adverse possession, that adverse possession commenced only in 1886 when the lands were enfranchised and 12 years had not elapsed from that date and that the plaintiffs' suit should be dismissed. Hence this second appeal chiefly on the ground that the Judge was wrong in not taking into consideration the plaintiffs' adverse possession before 1886.

C. Krishnan for *Joseph Satya Nadar* for appellant.

C. Ramachandra Rau Saheb for respondent.

The Court delivered the following

JUDGMENT.—The finding is that the land itself was the inam attached to the *nottam* office. It was, therefore, open to the Government to grant a valid title to the land by enfranchising the inam unless the right to do so was affected by adverse possession for 60 years on the part of the appellant. No such possession was set up by him. He has, therefore, no title as against the respondent who claims under an enfranchisement by Government on this ground. We confirm the decree of the lower appellate Court and dismiss the second appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Moore.

Ambalavana Pandara Sannidhi ... Appellant* (*Defendant*),

v.

Shanmugasundaram Pillai ... ... Respondent (*Plaintiff*).

Ambalavana Pandara Sannidhi *v.* Shanmugasundaram Pillai.

Reg. XXV of 1802, S. 11—Dismissal of a Kurnam by the Zemindar.

A Zemindar cannot suspend or dismiss a Kurnam from his office, without an order of a Civil Court therefor.

Obiter: Where a dismissed Kurnam sued for restoration and claimed by way of damages the salary due for the time during which he was out of office and the court allowed the whole claim though it was barred as to part:—

Held, that the appellate court might, in its discretion, refuse to interfere, as the courts were not bound to limit the damages to the salary attached to the office.

Second appeal from the decree of the Subordinate Judge's Court at Tinnevelly in A. S. No. 263 of 1897 reversing the decree of the District Munsif of Ambasamudram in O. S. No. 106 of 1896.

The plaintiff is the Kurnam, by hereditary right, of the mitta of Kambaneri Pudukudi belonging to the 1st defendant. The agent of the Mittadar by an order, dated 12th June 1891, dismissed the Kurnam from the office for various acts of misconduct. Hence this suit by the plaintiff for the recovery of his office together with the arrears of pay due to him. The main ground upon which he based his claim for restoration was that the order of the 12th June 1891 dismissing him from office was invalid and illegal, and that under S. 11 of the Regulation XXV of 1802 the defendant could not remove a Kurnam without the order of a Civil Court. Various pleas were raised, but they were all overruled by the District Munsif. He, however, decided that looking to S. 11 of Regulation XXV of 1802 it was clear that a dismissed Kurnam could claim restoration and damages only if the dismissal was proved to be *mala-fide* and iniquitous, but that since there was ample evidence in the case that the Kurnam was rightly dismissed for misconduct, the claim to restoration could not be sustained. But the Subordinate Judge on appeal held that the terms of the section were imperative, that the dismissal of a Kurnam by the Mittadar without

* S. A. No. 1362 of 1898. 15th March 1899.

Ambalavana Pandara Sannidhi v. Shanmugasundaram Pillai.

an order of the Court was therefore illegal, and that the plaintiff should be restored to office, and also decreed arrears of pay claimed by the plaintiff. From this decree the defendants appealed.

V. Krishnaswami Aiyar and *R. A. Krishnaswami Aiyar* for appellants.

C. R. Pattabhirama Aiyar for respondent.

The Court delivered the following

JUDGMENT :—The Sub-Judge was clearly right in holding that the zemindar had no power to suspend the respondent. The only other question for determination is whether the Subordinate Judge was right in decreeing salary from the date of the plaint to the time of the respondent's restoration to the office. Under S. 11 of Regulation XXV of 1802 the Zemindar is liable to make satisfaction for any injury done to the respondent by the illegal suspension. The paragraph 6 of the Subordinate Judge's judgment deals with the question as one of damages, and in allowing salary subsequent to the plaint he must be taken to have adopted that form of assessing the damages. Whether the respondent's claim for any portion of the damages sustained before the institution of the suit was barred by limitation, it is not necessary to consider, no such question having been raised in the lower Courts or in the memo of appeal here. Even if the claim be to any extent barred, we are not disposed to interfere with the amount awarded, since in assessing the damages the Courts are not restricted to limiting the same to the salary attached to the office.

The second appeal is, therefore, dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Arthur Collins, *Kt.*, Chief Justice, and Mr. Justice Benson.

Cherianujan Thirumalpad and others... Appellants* (*Petitioners*),

v.

Kararnamalpad and others ... . Respondents (*Counter-Petitioners*).

Cherianujan Thirumalpad v. Kararnamalpad.

Civil Procedure Code, S. 444—Minors—Guardian *ad litem*—Execution—Order against minor without guardian, invalidity of—Application by minor—Practice.

* A. A. A. O. No. 70 of 1898. 9th March 1899.

Cherianujan Thirumalpad v. Kararnamalpad.

An order for execution passed against a minor without a guardian *ad litem*, is invalid; and when it is brought to the notice of the court that an order passed by it is invalid for want of a guardian to represent the minor's interest, the court should immediately discharge the order.

Appeal from the order of the District Court of South Malabar in A. S. No. 297 of 1898 affirming the order of the Sub-Judge at Calicut in M. P. No. 355 of 1898.

The appellants are some of the plaintiffs to the original suit. The original suit was brought by certain persons to recover land and mesne profits. The 1st Court decided the case in favour of the defendants. The appellate Court reversed the decree of the 1st Court and decided in favour of the plaintiffs. This decision was in its turn reversed on second appeal. Before the second appeal was decided, the plaintiffs executed the decree of the appellate Court and obtained possession of the properties. After the decision of the High Court was passed, the defendants applied for restitution of the properties and for the recovery of costs and mesne profits and the money paid by them in execution of the decree of the appellate Court. This application was granted and the Subordinate Judge ordered execution to issue forthwith. The respondents 12 and 15 to 19 in that second appeal were minors, and the 3rd respondent who represented them as guardian in that appeal having subsequently died, there was nobody to represent their interest in execution. The executing court did not appoint anybody to be their guardian and the order in execution was passed without any guardian being appointed for them. These minors represented by one P. S. Ramu Pattar put in a petition to cancel the order already passed directing execution to issue, on the ground that they had not been properly represented in execution. The Subordinate Judge refused to entertain their petition and directed them to the High Court. Against this order they appealed to the District Judge, and he held that the 2nd respondent having been mentioned in the petition as guardian for the minors and the court having acted upon it, there was nothing irregular in the proceedings in execution. Hence this appeal.

T. M. Appu Nedungadi for appellants.

P. R. Sundara Aiyar for respondents.

Cherianujan Thirumalpad v. Kararnamalpad.

The Court delivered the following

JUDGMENT:—The order of the District Judge is not sustainable. Nor is the order of the Sub-Judge dated 7th March 1898. There is nothing to show that the 2nd respondent in the second appeal or any one else was ever legally appointed guardian of the minor (10 to 12 and 14 to 19 respondents in second appeal). If they were not legally represented when this order of the Sub-Judge, dated the 14th January 1898, was made, that order was liable under S. 444, C. P. C., to be discharged by the Court which made it as soon as the fact was proved before it. When, therefore, the minors petitioned the Court on the 18th February, the Sub-Judge should have enquired into their petition instead of referring them to the appellate Court.

We, therefore, set aside the order of the Sub-Judge dated 7th March, and the order of the District Judge now appealed against with costs throughout and direct the Sub-Judge to restore the petition to his file and deal with it in accordance with law.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Moore.

Krisna Doss Balamukunda Doss ... Appellant* (*Defendant*),

v.

Venkatappa ... ... Respondent (*Plaintiff*).

Krisna Doss Balamukunda Doss v. Venkatappa.

Rent Recovery Act, VIII of 1865—Lease of lands—Patta—Planting trees—Improper condition.

A tenant has a right to plant trees on the lands in his holding so long as it does not materially affect the character of the holding. And a patta containing a clause prohibiting the planting of any new trees is an improper patta and need not be accepted.

Second appeal from the decree of the District Court of North Arcot in A. S. No. 1 of 1898, affecting the decree of the Head Assistant Collector of North Arcot in Summary Suit No. 146 of 1897.

This suit was brought by the tenant to set aside an illegal distraint and obtain damages therefor. Among the various objections to the validity of the distraint, it was stated the patta was improper

* S. A. No. 1288 of 1898. 14th March 1899.

because it contained a clause prohibiting the cutting of trees without the landlord's permission, the planting of new trees and the erection of permanent buildings on the lands. The Head Assistant Collector held that the landlord had no right to insert that clause in the patta, that, therefore, there was no tender of a valid patta and that the distraint was invalid. On appeal the District Judge confirmed the decision of the lower Court. Hence the second appeal. Krisna Doss Balamunkunda Doss *v.* Venkatappa.

V. Bhashyam Aiyangar, *V. C. Desikachariar* and *E. Venkatarama Sarma* for appellant.

N. Subrahmanyam for respondent.

The Court delivered the following

JUDGMENT :—Without going into all objections taken to the patta we think we cannot but hold that the clause prohibiting the planting of any new trees whatever is open to question. No doubt, a tenant will not be entitled to plant trees on the land in his holding so as materially to affect the character of the holding. But in the case of dry lands at all events and such lands as form part of the holding here, a tenant may often be able to plant trees without necessarily affecting the utility of the lands for the purpose for which they are ordinarily used. In the present case no attempt was made by the appellant to prove that he was entitled to restrain the tenant from planting trees at all. The patta was, therefore, one which the tenant was not bound to accept and the distraint was bad. The second appeal fails and is dismissed with costs.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Present :—Lord Watson, Lord Hobhouse, Lord Macnaghten and Sir Richard Couch.

Pranal Annee ... ... Appellant * (*Defendant*),

v.

Lakshmi Annee and others ... ... Respondents (*Plaintiffs*).

Registration Act VIII of 1871 —Compromise deed—Title to immoveable property—Unregistered deed—Evidence—Admissibility. Pranal Annee *v.* Lakshmi Annee.

An agreement which deals with title to immoveable property of the value of more than Rs. 100 requires registration and is inadmissible in evidence of title if unregistered.

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* 4th March 1899.

Pranal Annee v. Lakshmi Annee.

Obiter: Where a suit relates only to *a part* of the claim arising from a cause of action and the Court passes a decree in respect of *that part* on the basis of a compromise the terms of which deal with the whole claim and are recited or referred to in the decree, the judgment of the Court is admissible as "evidence" of the settlement of that part of the claim which was not dealt with in the first decree, although the deed itself may be unregistered and so inadmissible in evidence.

Appeal from the decree of the High Court of Judicature at Madras.

The facts appear from the judgment.

Lord Watson.—Ramaswami Mudali, of Kappur, in the Presidency of Madras, a Hindu, subject to the Mitakshara law, died in the year 1872, leaving landed estates, part of which are the subject of the present litigation. He left no male descendant, but was survived by a widow, a daughter, and also by his mother. His widow, his daughter, and his mother, successively took a female estate in the lands which he left; and his mother, who was the last taker, died in December 1883. On her death, the lands were taken possession of on behalf of the present appellant, then an infant, who is the grand-daughter of the deceased, being the only child of his daughter.

On the 28th January 1885, a suit was raised in the Court of the Subordinate Judge of Kumbakonum, against the appellant, then a child eight years of age, as represented by her testamentary guardians, and also against four other defendants, at the instance of Varadaraja Mudali, now deceased, and the present respondents, Srinivasa Mudali and Manikka Mudali, who alleged that they were the reversionary heirs of Ramaswami. In their plaint, the reversionary heirs concluded for decree, against the present appellant and her guardians, for possession of certain lands which are not the subject of the present controversy; but it expressly excluded certain other lands, which had admittedly been the property of the deceased Ramaswami, and had also been taken possession of on behalf of the appellant, as part of the deceased's succession. These lands were purposely excluded from the plaint, because the plaintiffs, the reversionary heirs, had, on the 30th December 1884, conveyed their interest in them to one Vijayaraghava Patra Chariar, for the sum of Rs. 4,000 in order to provide themselves with funds to meet the expenses of litigation.

The suit of 1885 was, in so far as it concerned the interests of the plaintiffs and of the present appellant, brought to an amicable

conclusion; and the present appeal turns upon the effect of the mutual arrangement or compromise which was then made. That arrangement was embodied in two deeds, which bear the same date, the 16th January 1886, the one being a razinamah, and the other an agreement, or, as it is entitled, "an agreement of union." Pranal Annee v. Lakshmi Annee.

By the deed last mentioned, the agreement of union, between the plaintiffs on the one hand, who now are, or are represented by, the present respondents, and the appellant who was then, being still a minor, represented by her husband and guardian, Venkatarunga Mudaliar, on the other hand, it was agreed that the second contracting parties should have and retain one-half share of the lands which were claimed from the appellant and her guardians in the suit of 1885, and should also have or retain one-half share of the lands which had been excluded from that suit, and had been conveyed to Vijayaraghava Patra Chariar. The deed of agreement was not produced in the suit of 1885, and was not submitted to the Subordinate Judge of Kumbakonum, before whom that litigation depended. It was not registered, in accordance with the provisions of Act VIII of 1871, although it professes to deal with the title to immoveable property, which is admittedly beyond the value of one hundred rupees.

The second document executed by the same parties, the razinamah, was not registered in terms of Act VIII of 1871, but it was produced in the suit of 1885; its terms were considered in a judgment delivered by the Subordinate Judge of Kumbakonum, on the 31st March 1886; and they were made the foundation of an order passed by the learned Judge, the parties to the document having concurred in moving "that a decree may be passed in accordance "with the razinamah which they have presented under Section 375 "of the Civil Procedure Act, after settling."

The razinamah had incorporated with it four schedules of lands, marked respectively A, B, C and D; Schedule D containing a description of the lands which had been expressly excluded from the suit of 1885, and of no others. In the body of the document, the parties, *first*, set forth in detail the lands as to which they were in controversy in the suit of 1885, and concluded by stating that they had agreed, each to take a certain share of these lands, and their

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produce, "in full satisfaction of all claims within the 15th of "Panguni (27th March 1886) next"; and that both the parties shall "bear their respective costs of this suit." In the *second* place, the document set forth as follows:—Remarks.—"Not only have we, "on this date, entered into a union agreement in regard to the "land, &c., referred to in the plaint in this suit, and described in "Schedule D hereof, and divided thereunder the said lands into "two equal shares between us, but a deed of release has also been "taken from the 7th defendant's (present appellant's) guardian in "relinquishment of the right possessed by the 7th defendant (present "appellant) to the said half share of lands."

In the judgment delivered by him on the 31st March 1886, the Subordinate Judge, having the razinamah before him, treated the first part of it as the only portion of the contents of the document with which he was desired by the parties to deal. In giving effect to its terms, the learned Judge observed:—"The 7th defendant "(present appellant) is her only daughter, (*i.e.*, of Ramaswami's "granddaughter), and she and the plaintiff have put in a razinamah "in respect to items 1, 3, 5 and 7, and a decree in its terms has "been passed." It is admitted that items 1, 3, 5 and 7, specified by the learned Judge, were the lands claimed from the present appellant in the suit of 1855. The learned Judge, plainly, did not understand that he was asked by the parties, either to consider, or to give effect to the terms of the compromise which the parties narrated by way of remark, that they had made with respect to the lands contained in Schedule D of the razinamah, which are the subject of this appeal. Accordingly, the order passed by him did not include, and had no reference to these lands.

The fact has not been disputed, that at, or shortly after the execution of the two deeds of the 16th January 1886, the parties acted upon the whole of the mutual agreement contained in or narrated by those deeds; that they each took one-half share, not only of the lands in controversy between them in the suit of 1885, but of the lands excepted from that suit, as to which they are in controversy in the present case. The appellant was permitted to enter into possession of her half share of all those lands; and whilst the respondents, the reversionary heirs of Ramaswami, do not

challenge her title to one-half of the lands for which they sued her in the action of 1885, they claim, in this action, to have right to the half which she possessed of the lands excluded from that action, and described in Schedule D of the razinamah. The only defence which their Lordships are asked to sustain, on behalf of the appellant, is mainly, if not wholly, founded upon the terms of the two deeds of 16th January 1886, and of the proceedings which followed upon them.

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There are two suits, subsequent to these proceedings for compromise, which it is necessary to notice, although they do not materially affect the question which their Lordships have to decide. In both these suits, it was the interest of the parties to this appeal, to defeat the claims of the plaintiffs, because these, if successful, would have carried off the whole or part of the lands which the present parties had chosen to treat as belonging to one or other, or both of them.

In 1886, a suit was brought against the parties to this appeal, by Kuppachi Anni, the elder sister of Ramaswami, who claimed his estates as his reversionary heir, and pleaded that the proceedings of the defendants with a view to compromise had been fraudulent. The suit was dismissed with costs by the Subordinate Judge of Kumbakonum, on the 7th May 1887, and his decree was allowed to become final.

In the year 1888, Vijayaraghava Patra Chariar sued the parties to this appeal, for the enforcement of the sale-deed which he had obtained, in December 1884, from the reversionary heirs, of their interest in the lands which are the subject of this appeal. The parties, whom he called as defendants, joined in defence to the action, and set up the division of the property between them under the compromise of January 1886. The Subordinate Judge, on the 6th November 1889, held that the transaction which the plaintiff sought to enforce, was one not of sale but of loan, and gave him decree for Rs. 1,300. On appeal to the High Court, the decree was varied by increasing the sum awarded to Rs. 4,000.

Although the mere statement of the facts of this appeal has necessarily occupied some time, yet the questions to which these give rise lie within a very narrow compass. The respondents rest

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their claim to possession of the lands in dispute upon their title as the reversionary heirs of the deceased Ramaswami; and the appellant does not, in this appeal, defend her possession, except upon the ground that she, as in a question with the respondents, derived a valid title from the compromise embodied in the razinamah and agreement of union, and to the effect which was given to the razinamah, by the Subordinate Judge of Kumbakonum, in the suit of 1885.

It is sufficiently obvious that, in maintaining that defence, the appellant can derive no aid from the terms of the agreement of union. The document has not been registered under the provisions of Act VIII of 1871; and, therefore, its stipulations are ineffectual in law, to create, in favour of the appellant, any right, title, or interest to or in the lands in dispute.

The razinamah was not registered in accordance with the Act of 1871; but the objection, founded upon its non-registration, does not, in their Lordships' opinion, apply to its stipulations and provisions, in so far as these were incorporated with, and given effect to by, the order made upon it by the Subordinate Judge, in the suit of 1885. The razinamah, in so far as it was submitted to, and was acted upon judicially by the learned Judge, was in itself a step of judicial procedure not requiring registration; and any order, pronounced in terms of it constituted *res judicata*, binding upon both the parties to this appeal, who gave their consent to it.

If the parties, after agreeing to settle the suit of 1885, on the footing that they were each to take a half share of the lands involved in that suit, and also a half share of the lands now in dispute, had informed the learned Judge that these were the terms of the compromise, and had invited him, by reason of such compromise, to dispose of the conclusions of the suit of 1885, their Lordships see no reason to doubt that the order of the learned Judge, if it had referred to or narrated these terms of compromise, would have been judicial evidence, available to the appellant, that the respondents had agreed to transfer to her the moiety of land now in dispute. But their Lordships are unable to find that any such course was taken, either in the razinamah, or in the judicial order which gave effect to it. The razinamah merely referred, by

way of remark, to the lands now in dispute; and the Judge was only asked to give effect to a compromise which related to the lands then in dispute before him. This order, accordingly, merely concerns the latter, and has no reference whatever to the lands described in Schedule D of the razinamah. So far as regarded these lands, the compromise was not submitted to the learned Judge, but was deliberately left by the parties to stand upon their unregistered agreement of union. Pranal Annee v. Lakshmi Annee.

For these reasons, which are substantially the same with those assigned by both Courts below, their Lordships will humbly advise Her Majesty to affirm the judgment appealed from. The appellant must pay the costs of the 2nd and 3rd respondents who defended this appeal.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Moore.

Raman Menon and others ... ... Appellants * (*Defendants*),

v.

Ittimayamma and others ... ... Respondents (*Plaintiffs* and *Defendants* 1, 3 and 6).

Malabar Law—Suit for maintenance—Living away from the tarwad house—Civil Procedure Code—Suit by mother and children for maintenance—Misjoinder. Raman Menon v. Ittimayamma.

A mother and sons, members of a Malabar tarwad residing together may maintain a joint suit for maintenance.

The fact that a woman now and then visits her husband in his own house does not amount to living away from the tarwad house so as to disentitle her to claim maintenance from the tarwad to which she belongs.

Second appeal from the decree of the Subordinate Judge's Court of South Malabar in A. S. No. 77 of 1897, modifying the decree of the District Munsif of Chowghat in O. S. No. 349 of 1896.

The plaintiffs are mother and children forming a branch of a tarwad of which the 1st defendant is the karnavan. They brought this suit against the karnavan and the other members of the family

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* S. A. No. 1194 of 1898. 9th March 1899.

Raman Menon v. Ittimayamma.

for the recovery of arrears of maintenance. The defendants raised various pleas of which we need notice only two for the purposes of this report, viz., (1) that the plaintiffs who were living away from the tarwad house were not entitled to claim maintenance; and (2) that the plaintiffs could not maintain a joint suit, and the first suit was bad for misjoinder of parties and causes of action.

As to the first point, the District Munsif found that there was some evidence that the mother now and then went and lived with her husband, but that it was equally clear from the evidence of reliable witnesses that her usual residence was a house of the tarwad, that her occasional absence from the tarwad house cannot be construed to be living apart from the tarwad so as to disentitle her to claim maintenance from the tarwad. As to the second point he held that since the mother and children were living together they could maintain a joint suit for maintenance and that the suit was not bad for misjoinder of parties and causes of action. In the result, he gave a decree to the plaintiffs, which was affirmed by the District Judge with some modification as to the amount awarded for maintenance. Hence this appeal.

T. M. Appu Nedungadi for appellants.

P. R. Sundara Aiyar for 1st to 9th respondents.

The Court delivered the following

JUDGMENT:—The plaintiffs are mother and children. Their case is that they reside together. They claim a joint maintenance. In such a case we see no objection to their suing together. The finding is that they live in a tarwad house, but that the 1st plaintiff occasionally goes to a house built by her husband. This latter circumstance does not of course affect their right to maintenance. It would be different if the 1st plaintiff and her children had been proved to be residing in the husband's house permanently, but as already stated, both Courts find that such is not proved to be the case in the present instance. In these circumstances, we have no alternative but to confirm the decree of the lower Courts and dismiss the second appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Moore.

Ramasami Chetti and another ... Appellants* (*Plaintiffs*),

v.

Manikka Mudali and another ... Respondents (*Defendants* 2 and 3).

Ramasami Chetti *v.* Manikka Mudali.

Hindu Law—Joint Hindu family—Bond executed to one member—Payment to him—Discharge.

Where a debt due to a joint undivided Hindu family stands in the name of one member, he is *primâ facie* the person entitled to collect the debt; and a payment made to him without notice of any exclusive interest subsequently acquired by the other members validly discharges the debt.

Second appeal from the decree of the District Court of Chingleput in A. S. No. 326 of 1897, reversing the decree of the District Munsif of Chingleput in O. S. No. 416 of 1895.

The plaintiffs brought this suit to recover from the defendants Rs. 547-8-0 due for principal and interest on a hypothecation bond executed by them on the 19th September 1888, and subsequent interest and costs. The material allegations in the plaint are as follows:—The 1st plaintiff, who is the father of the 2nd plaintiff and 1st defendant, advanced Rs. 500 to the 2nd and the 3rd defendants and got a mortgage bond from them, dated 19th September 1888, in the name of the 1st defendant. Subsequently, the 1st defendant separated himself from the family, received certain moveable and immoveable properties for his share and released his right in the remainder in favour of his father and brother. Under this release deed, dated 27th June 1893, the hypothecation bond fell to the share of the plaintiffs. On the 30th June following they gave notice of this arrangement to the debtors, defendants 2 and 3. On two subsequent dates, on the demand of the plaintiffs, the defendants 2 and 3 executed two bonds to them, one for Rs. 100 and the other for Rs. 210, for interest due on the suit bond; and two suits were brought on the said bonds, and both suits were decreed in favour of the plaintiffs. The present suit was brought to recover money due on the original hypothecation bond.

* S. A. No. 1295 of 1898. 17th March 1899.

Ramasami Chetti v. Manikka Mudali.

The defendants 2 and 3 pleaded payment of the money to the 1st defendant and produced a receipt from him, dated the 9th September, 1895. They further averred that notice of the partition was never given to them.

The District Munsif found that notice of the partition had been given to defendants 2 and 3, and that the alleged payment to 1st defendant was false, and accordingly allowed the plaintiff's claim. On appeal the District Judge thought that there was no evidence that defendants 2 and 3 had notice of the partition, that the execution of the two bonds to the plaintiffs is explicable since the debt was due to a joint family and the 1st plaintiff was its manager; and held that defendants 2 and 3 were discharged by the payment made to the 1st defendant. He, therefore, dismissed the plaintiff's suit, Hence this second appeal.

P. S. Sivaswami Aiyar for appellants.

C. R. Pattabhirama Aiyar for respondents.

The Court delivered the following

JUDGMENT:—We are unable to accept the contention that though the mortgage-bond was executed in favor of the 1st defendant, he was not entitled to receive payment of the amount due, under the bond so as to bind the plaintiffs as co-parceners interested in the money. As the party to the contract the 1st defendant was *primâ facie* the person entitled to collect the amount. It is found that the payment was made without notice of their claim under the release, relied on by the plaintiffs.

The second appeal fails and is dismissed with costs.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Present:—Lord Watson, Lord Hobhouse, and Sir Richard Couch.

Sri Braja Kisora Devu ... ... Appellant*.

v.

Sri Kundana Devi Patta Mahadevi ... ... Respondent.

Sri Braja Kisora Devu *v.* Sri Kundana Devi Patta Mahadevi.

Hindu Law—Gift to wife—Nature of the estate given—No evidence—Presumption.

There is no presumption of law, that until the contrary is proved a gift to wife is of an absolute estate.

Appeal from the decree of the High Court of Judicature at Madras.

The facts appear from the judgment.

Lord Hobhouse.—This question relates to the distribution of a sum of money paid into Court as the price of land taken under the Land Acquisition Act, 1870. The land taken is situate in a village called Maulabhonaja which formed part of the zemindari of Chinna Kimedi. The disputant parties are: the Zemindar who appeals; and his adoptive mother, the widow of a former Zemindar, who is respondent. The sum is small, but the title to it is the same as the title to the whole village, and on that ground the High Court has granted leave to appeal.

It is not disputed that the widow has been enjoying the revenues of the village for many years. She alleges that it was granted to her by her husband as an absolute jagheer. The Zemindar alleges that it was assigned only by way of maintenance to her. That was the first issue which the District Judge stated for trial.

On the trial no document containing any grant was produced by the widow. She produced two letters from the Collector written on an occasion when the Zemindar then in authority denied that she had any title at all. The first (Exhibit I.) is dated 13th May 1871, and is addressed to the Zemindar. It contains this passage:—

"Sri Kundana Devi Patta Mahadevi Garu has sent me an arzi stat-
"ing, among other matters, that her husband, the late Sri Audiconda

* 4th March 1899.

Sri Braja Kişora Devu v. Sri Kundana Devi Patta Mahadevi.

"Devu Zemindar Garu placed her in possession of the three villages "of Pattuguda, Maulabhonaja and Bholladi attached to Pratapagiri "Taluq, as jagheer, that after her husband's death the late Collector, "Mr. Carmichael, put her in enjoyment of the said villages, that "upon your accession to the zemindari you also wrote and gave her "a document for her enjoying those three villages as a jagheer for her "life."

The other letter, dated 15th June 1872, is addressed to a Magistrate. It commences thus:—

"It appears from the decrees hitherto passed by this Court that the "right to the two villages of Maulabhonaja and Pattuguda in Pratapagiri Taluq belongs to Mahadevi Garu, and that they were given by "the Zemindar as mokhasa for her enjoyment for life. There is "nothing to show that that grant was cancelled as alleged by the "present Zemindar."

The term mokhasa is explained to be the equivalent of the more generally known term jagheer. Each shows that the land is to be held for the benefit of the holder. Neither defines the duration of the holding. These terms therefore are consistent with either theory, and the Court must judge between them by such indications as it can get. The District Judge gave his opinion thus:—

"The presumption in such cases where an Uriya Zemindar in this "District gives a village to his wife after or in marriage is that it was "a life-interest only that was given. In this case all the evidence "produced by claimants to rebut this presumption only confirms it.

"The contention for claimant 1 under issue I is baseless and "rejected."

He proceeded to award to each claimant one-half of the fund.

The widow appealed to the High Court. The learned Judges said that, *primâ facie*, a gift by a husband to his wife is by way of stridhan and that such a gift passes to her heirs. They add that the District Judge had referred to a local custom of which there was no evidence; and they remanded the case for him to find "Whether there is a local custom for Zemindars to give villages to "their wives for life only, and if such custom is valid."

Sri Braja Kisora Devu v. Sri Kundana Devi Patta Mahadevi.

In point of fact, the District Judge had not referred to any custom at all, in its legal sense of a rule exceptional to the general law. He had only stated what in his opinion was the presumption relating to gifts by Uriya Zemindars to their wives; and very likely his opinion was guided by what he had himself known to be done. It is not suggested that there is any rule of Hindu law forbidding Zemindars to make gifts to their wives by way of maintenance if they are so minded. A custom, such as contemplated by the issue directed on remand, is some established practice at variance with the general law. How can there be a custom to do that which the general law permits any one to do, or abstain from, at his own will? There might be a rigid local or tribal rule forbidding grants to wives except for maintenance. But that is not the scope of the issue; nor could it be, seeing that the power of this Zemindar to make a complete alienation is not questioned. The inquiry seems to be unmeaning and therefore misleading. However, the District Judge addressed himself to the duty thrown upon him, and examined three witnesses who said it is the custom in Chinna Kimedi and in other specified zemindaries to give villages to zemindarnis for life, to be resumed at their deaths. Upon these statements he found in favour of the custom.

On appeal the High Court held that this evidence was inadequate to prove a custom, and in this their Lordships agree. The learned Judges then refer to their previously expressed opinion as to presumption, and saying that the general law must prevail decide in favour of the widow. This, however, is a case in which the terms of the grant to the widow, if there ever was any expressed in any terms, are unknown. She has enjoyed the revenue for many years, and that is all we know. There is no general law to determine under such circumstances the amount of benefit which a husband, having absolute discretion in the matter, has conferred on his wife. The two documents produced by the widow herself bear against her view, though it must be confessed that their weight is slight. The evidence of the witnesses is very slight, but such as it is, it goes to show that the idea of giving land for *life only* to a wife by way of maintenance is not unfamiliar among the class to which this Zemindar belongs, as indeed it is highly improbable that it should be.

Sri Braja Kisora Devu v. Sri Kundana Devi Patta Mahadevi.

Their Lordships think that the High Court has been misled by the idea that the nature of the gift is governed by some rule of law which can only be contravened by the establishment of a custom. They agree with the District Judge that there is no sufficient ground for holding that the village has been alienated from the zemindari in perpetuity. And they think that his division of the fund into halves is a very reasonable way of dealing with it. They will humbly advise Her Majesty to reverse the decree appealed from and to restore the award of the District Judge. The respondent must pay the costs of the proceedings in the High Court and of this appeal.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Subrahmania Aiyar and Mr. Justice Davies.

Subbarayya Mudali and another ... Appellants* (*Plaintiffs*),

v.

Kamu Chetti ... ... Respondent (*Defendant*).

Subbarayya Mudali v. Kamu Chetti.

Service inam—Enfranchisement—Widow—Power of alienation—Right of reversioner.

Where a service inam is enfranchised in the name of a widow who was doing the service and holding the inam at the time, the interest acquired by her in the property is complete ownership, and not the limited interest of a widow under the Hindu law, *Narayana* v. *Chengalamma*, I. L. R., 10 M., 1, distinguished; *Venkatrayudu* v. *Venkataramayya*, *Ib.* 15 M., 284, and *Durgamma* v. *Virrazu*, *Ib.* 21 M., 47, and *Salemma* v. *Lutchmana Reddi*, *Ib.* 100 followed.

Second appeal from the decree of the District Court of North Arcot in A. S. No. 17 of 1897, affirming the decree of the District Munsif of Arni in O. S. No. 596 of 1895.

The suit which gave rise to this second appeal was one of a batch of suits brought by the reversioners to have it declared that the alienation made by the widow was invalid as against the plaintiffs and to establish their reversionary right to the properties comprised in the suit. The defendant pleaded that the properties were not inherited by the widow from her husband but acquired by her and also alleged that the alienations were made for valid purposes, *viz.*, for the discharge of debts incurred by her husband.

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* S. A. No. 819 of 1898. 27th February 1899.

The contention that the properties were the separate acquisition of the widow was based upon the fact that the lands formed service inam and did not become the property of anybody until it was enfranchised, that the enfranchisement having been made in the name of the widow it amounted to a personal grant to the widow and that, therefore, she had an alienable interest in it.

Subbarayya Mudili v. Kamu Chetti.

The District Munsif held that the benefit derived by the widow by enfranchisement was one gained in her position as heir to her husband, that such an acquisition should be held to have been made for the benefit of the family and that, therefore, she could not have anything more than a widow's estate in it. And as he found that the defendants had not made out any justifiable necessity for the alienation he gave a decree to the plaintiffs. On appeal, the District Judge held that the law laid down by the District Munsif that the widow having obtained the benefit of enfranchisement in the capacity of heir to her husband must be held to have acquired it for the benefit of the family and not for herself exclusively, was opposed to the principle laid down in *Venkatrayudu* v. *Venkataramayya* I. L. R., 15 M., 284, and that the reversioners had no right to question the alienation made by the widow. He accordingly dismissed the plaintiffs' suit. Against that decision this second appeal was preferred.

T. P. Kothandarama Aiyar for appellants.

P. R. Sundara Aiyar for respondent.

The Court delivered the following

JUDGMENT:—The case at *Narayana* v. *Chengalamma*, I. L. R., 10 M., 1, is not in point as the inam there was not attached to a village office as in this case. There is no reason to suppose that the Government in granting the inam to the widow of Kandaswami (2nd defendant) intended to limit her rights to a widow's estate. We do not find anything in the judgment in S. A. No. 222 of 1896 to warrant the raising of such a presumption in this case. Our present conclusion is in accordance with the decision in *Venkatrayudu* v. *Venkataramayya*, I. L. R., 15 M., 284, and *Dharanipraguda Durgamma* v. *Kadambari Virrazu*, I. L. R., 21 M., 47, and *Salemma* v. *Lutchmana Reddi*, *Ib*. 100.

The second appeal fails and is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Moore.

Thimmakkal ... ... Appellant* (*2nd Defendant*),

v.

Nachiyar Ammal and another ... Respondents (*Plaintiffs* and *1st Defendant*).

Thimmakkal *v.* Nachiyar Ammal.

Rent Recovery Act VIII of 1865—Patta, sole title to—Revenue Courts—Jurisdiction.

The Revenue Courts have jurisdiction to incidentally decide a question as to title.

Second appeal from the decree of the District Court of Madura in A. S. No. 403 of 1897 affirming the decree of the Deputy Collector of Madura in Revenue Suit No 28 of 1897.

This was a summary suit for an order directing the 1st defendant, manager of the Madura Devasthanam, to issue a proper patta in the name of the plaintiff. The plaintiff is the widow of one Venkatasami Reddi, a deceased pattadar, and the 2nd defendant is his mother. After the death of the said Venkatasami Reddi, the Manager of the Devasthanam issued a patta in the joint names of the widow and the mother for fasli 1306. Hence this suit by the widow for an issue of patta in her sole name. The only objection taken by the 2nd defendant was that the question raised in the suit was one of title and could not be decided by a Revenue Court according to the ruling in VII Madras Revenue Register, p. 103. This objection was overruled and the Deputy Collector decided that according to the Hindu Law the widow was entitled to succeed to her husband in preference to the mother and that the patta should be issued in the sole name of the plaintiff. This decision of the Deputy Collector was confirmed on appeal by the District Judge. Hence this second appeal.

P. R. Sundara Aiyar for appellant.

M. K. Vaidianadha Aiyar for 1st respondent.

* S. A. No. 1248 of 1898. 9th March 1899.

The Court delivered the following

Thimmakkal v. Nachiyar Ammal.

JUDGMENT:—The Revenue Court has power to determine incidentally whether the plaintiff is entitled to enforce the grant of the patta to her, as the sole tenant.

The second appeal fails and is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Boddam.

Subbier ... ... Appellant* (Defendant),

v.

Ranga Aiyangar ... ... Respondent (Plaintiff).

Subbier v. Ranga Aiyangar.

Limitation Act, Ss. 36, 120—Hereditary office—Profits thereof, suit for—Limitation—Civil Procedure Code, S. 211—Mesne profits.

Where the possession of a person against whom a suit is brought for recovery of possession is not totally wrongful but under a colour of right, no claim for mesne profits can be made under S. 211, C. P. C., And a subsequent suit for the recovery of mesne profits is not barred by res judicata. (a)

A suit for the recovery of profits of a hereditary office wrongfully withheld is governed by Art. 120.

Second appeal from the decree of District Court of Trichinopoly in A. S. No. 229 of 1896, modifying the decree of the Court of the District Munsif of Kulitalai in O. S. No. 420 of 1895.

This suit was brought by a hereditary stanikam-holder in the temples of Venugopalaswami and Malaiperumal against the dharmakarta for the recovery of emoluments wrongfully withheld. The plaintiff brought a suit, O. S. No. 551 of 1891, against this same defendant for the recovery of his stanikam right and profits attached thereto. In that suit profits were claimed only up to the date of the plaint. The suit was decreed in his favour, and he now brought this suit to recover profits due for the period subsequent to that

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* S. A. No. 1300 of 1898. 20th March 1899.

(a) NOTE.—See as to the question of *res judicata* in regard to future mesne profits *Harmohini Chowdhrain* v. *Dhanmani Chowdhrain*, 1 B. L. R. (A. C.,) 138, and *Mon Mohun Sirkar* v. *The Secretary of State*, I. L. R., 17 C., 968, and other cases quoted therein.

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date. In respect of the 1st temple, profits were claimed for the period between the 14th July 1892 and 18th May 1893, and in respect of the 2nd temple between the 15th December 1891 and 13th July 1892. And this suit was filed on the 9th July 1895.

The defendant, *inter alia,* contended that subsequent profits should have been claimed in the previous suit, that the suit was, therefore, *res judicata,* and that the suit was barred by limitation.

The District Munsif overruled the plea of *res judicata.* As to the question of limitation he was of opinion that the suit was really one for mesne profits and was governed by Art. 109. He, therefore, disallowed the major portion of the claim in respect of the 2nd temple as barred by limitation. Both parties appealed. The plaintiff contended that Art. 132 or Art. 144 should have been applied to his case, and that, therefore, no portion of his claim was barred. On the other hand, the defendant contended that the suit was for damages on a tort falling under Art. 36, that, therefore, the whole claim should have been held to be barred. The District Judge held that neither of these articles, nor Art. 109 governed the case, and that the suit really fell under Art. 124 (suit for hereditary office) and was not barred. Hence the defendant appealed.

T. V. Seshagiri Aiyar for appellant.

John Adam for respondent.

The Court delivered the following

JUDGMENT :—Assuming that the right to a hereditary office such as this is a right to immoveable property and that the profits payable by the appellant are profits arising out of immoveable property so as to come within S. 211, C. P. C., the plaintiff in his former suit did not allege that the appellant was in wrongful possession so as to claim mesne profits from him under S. 211, and, therefore, no question of *res judicata* arises.

We are unable to agree with the contention that Art. 36 of the Limitation Act applies. The case is not specifically provided for, and in our opinion comes under Art. 120.

The second appeal fails, and is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice. Subrahmania Aiyar, and Mr. Justice Moore.

Subrahmanya Mudaly and others ... Appellant* (*Defendant 2nd to 4th*),

v.

Chithraputra Mudaly and others ... Respondents (*Plaintiff and Defendant 1st & 5th*).

Subrahmanya Mudaly *v.* Chithraputra Mudaly.

Specific Relief Act, S. 42—Suit for declaration against mortgagee—Redemption—Consequential relief.

The purchaser of mortgaged property may maintain a suit for a declaration that a sale deed set up by the mortgagee is fraudulent and invalid without suing for redemption of the mortgage.

Second appeal from the decree of the Temporary Subordinate Judge's Court at Tinnevelly in A. S. No. 207 of 1897 affirming the decree of the District Munsif of Srivilliputtur in O. S. No. 31 of 1897.

This was a suit for a declaration of the plaintiff's exclusive right to a house and ground under a sale deed executed by the 1st defendant on the 7th of February, 1896. The plaintiff bought the plaint house and ground from the 1st defendant and her husband on the 7th of February, 1896. Out of the consideration of Rs. 100, he paid Rs. 80 to the 1st defendant reserving Rs. 20 for the discharge of a mortgage on the plaint lands in favour of the 2nd defendant. But the 2nd defendant having in the meanwhile come to know of the sale to the plaintiff, fabricated a sale deed of the property in his own favour and claimed to be absolutely entitled to the plaint lands. Subsequently through the intervention of certain *panchayetdars*, it was settled that the plaintiff should receive the Rs. 20 due on the mortgage and deliver up the sale deed to him. Notwithstanding this arrangement, the 2nd defendant presented his sale deed for registration, and got it registered. Hence this suit.

The defendant *inter alia* contended that his sale deed was genuine, that the sale deed executed by the 1st defendant to the plaintiff was collusive and fraudulent and that he was in possession of the properties and a suit for a mere declaration was, therefore, not maintainable.

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* S. A. No. 1304 of 1898. 14th March 1899.

Subrahmanya Mudaly v. Chithraputra Mudaly.

The District Munsif found that the sale deed relied on by the 2nd defendant was false and fraudulent and made the declaration asked for by the plaintiff. As to the objection that a suit for a mere declaration was unsustainable, he disposed of it by saying that the 2nd defendant was in possession of the property as mortgagee, that possession of it could not be claimed except in a suit for redemption, that the plaintiff could not be compelled to bring a suit to redeem, and that, therefore, a suit for a mere declaration was not unsustainable. On appeal, the Subordinate Judge agreed that a suit in that form was maintainable, and seeing no reason to differ from the District Munsif on the other questions in the case dismissed the appeal and the plaintiff thereupon preferred this second appeal.

K. Srinivasa Aiyangar for appellant.

T. M. Appu Nedungadi for respondents.

The Court delivered the following

JUDGMENT:—The suit was substantially for a declaration that the sale deed set up by the appellant (defendant) was fraudulent and invalid as against the respondent. In such a suit, the respondent was not bound to sue for redemption. The view taken by the lower Courts is right. The second appeal is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Shephard and Mr. Justice Subrahmania Aiyar.

Perianna Servaigaran ... ... Appellant * (*Defendant*),

v.

Maduranayagam Pillai ... ... Respondent (*Plaintiff*).

Perianna Servaigaran v. Madurai-nayagam Pillai.

Transfer of Property Act, Ss. 68, 72, 74 and 95—Usufructuary mortgage—Payment to prior incumbrancer—Tacking—Suit under S. 68—Practice—Court fees—Appeal against part of a decree.

Where it is clear that the appeal relates only to a part of the decree of the lower court, a memorandum of appeal stamped with reference to such part is sufficiently stamped, notwithstanding that the grounds of the appeal may go to the root of the whole decree.

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* S. A. No. 433 of 1898. 27th January 1899.

Perianna Servaigaran *v.* Madurai-nayagam Pillai.

Where a usufructuary mortgagee, who never obtained possession under his mortgage, paid money to avoid a sale of the property in execution of a prior mortgage decree and subsequently brought a suit to recover the money due on his own mortgage and that which he paid to the decree-holder, by a sale of the property which had in the meanwhile passed over by a sale to a third party:—

Held, that the suit for sale should be dismissed so far as it related [and the appeal related only to it] to the money paid in discharge of the prior mortgage decree.

Per Shephard, J.:—The payment in discharge of a prior incumbrance does not confer upon the payer any greater right than that possessed by the incumbrancer.

The money paid to the decree-holder cannot be tacked to the principal debt, first, because the payment in its nature is not one contemplated by S. 72 of the Transfer of Property Act, and, secondly, because the plaintiff was not in possession of the mortgaged property when alone S. 72 is applicable.

Per Subrahmania Aiyar, J.:—A mortgagee has, as against his mortgagor, a right to tack to the mortgage amount any money that he may have paid in discharge of prior incumbrances. But when a usufructuary mortgagee brings a suit under clauses 2 and 3 of S. 68 of the Transfer of Prroperty Act, the decree for the mortgage money itself being only a money decree, the claim in respect of its accessory, *viz.*, the money which he is entitled to tack to it, can be in no better position and no charge can be claimed in respect of it.

Second appeal from the decree of the District Court of Trichinopoly in A. S. No. 133 of 1896, modifying the decree of the Court of the District Munsif of Kulitalai in O. S. No. 890 of 1894.

Two persons, Perumal and Muthaiyan, instituted a suit O. S. No. 406 of 1882 against one Madurai Servaigaran and two others for the redemption of the plaint properties. The Court found that Rs. 100 was due to Madurai and gave a decree for the plaintiffs conditioned on their paying the Rs. 100 due to the defendant. This decree was passed on the 26th of February 1883. On the 25th May 1883, the two plaintiffs above-mentioned executed a usufructuary mortgage for Rs. 190 to one Annasami Pillai, the brother of the plaintiff in the present suit. Of this Rs. 190, 100 was to go to Madurai, the decree-holder in O. S. No. 405, and Rs. 90 to pay sundry other debts due by them. But in the meanwhile Madurai had appealed against the decree in O. S. No. 406. Subsequently a compromise decree was passed, by which it was provided that Madurai was to receive Rs. 285 instead of Rs. 100, that the money was to be paid before the 11th May 1885, that if default was made, the said

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Madurai should be at liberty to realise the money by a sale of the properties, and that till the money was paid he was to be in possession of the properties. Default was made in the payment of money before the date fixed. Madurai attached the properties, and on the 22nd July 1885 applied to the Court to have the properties sold in execution. On the 3rd August 1885, Annasami Pillai intervened with an offer to deposit the sum of Rs. 296-10-0 and asked the Court to raise the attachment. The money was deposited in Court. Five days later the judgment-debtors objected to the deposit by Annasami on the ground that he had no interest in the properties, and prayed that the money might be returned to him. The Court refused to do so except on condition that they deposit the decree amount within three days of that date. This they did not do, and the money was paid to Madurai. Perumal and Muthaiyan, however, by a registered deed, dated 8th August 1885, sold their properties to the present defendant. The plaintiff never got possession of the properties under his usufructuary mortgage. The plaintiff now brought this suit to recover with interest the sum of Rs. 190 due on the mortgage and the sum of Rs. 296-10-0 paid by him to Madurai in order to save the property from sale with interest thereon by way of damages.

It was contended by the defendants that the mortgage to the plaintiff's brother would not avail against their sale-deed, that it was they that paid the sum of Rs. 296-10-0 due to Madurai, and that the suit was barred by limitation. The District Munsif found, as a matter of fact, that the sum paid to Madurai was the plaintiff's and not the defendant's. But, as a matter of law, he decided that when he paid Madurai, he was at the best, only entitled to stand in his place as a decree-holder in respect of that sum, that, therefore, the claim in respect of that sum could not form the subject of a separate suit and that it was barred by limitation. As to interest, he held that the suit was one brought under S. 68 of the Transfer of Property Act, that the section did not provide for the recovery of interest, that, therefore, interest could be claimed only by way of damages, but that the suit, so far as the claim for damages was concerned, not having been instituted within six years from the date on which the plaintiff was entitled to sue for possession, was barred by limitation. In the result he gave a decree for Rs. 190, the money due under the mortgage.

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On appeal, the District Judge held that S. 72 of the Transfer of Property Act did not apply to the case, but that, inasmuch as the defendant could not have got possession of the properties if the present plaintiff had not redeemed Madurai by payment of Rs. 296-10-0, he was entitled to tack that amount as against the defendant. He, therefore, modified the decree of the lower Court by substituting Rs. 486-10-0 in place of the sum of Rs. 190 decreed by the lower Court.

The defendant appealed against the modification of the District Munsif's decree. And the plaintiff put in a memorandum of objections under S. 561, claiming interest on both the sums decreed by the lower appellate Court. A preliminary objection was taken that the memorandum of appeal going to the root of the whole decree, stamp should have been paid on Rs. 486-10-0, and not, as had been done, on Rs. 296-10-0; that, therefore, there was no valid appeal before the Court and that the appeal should be dismissed.

P. R. Sundara Aiyar for appellant.

V. Krishnamani Aiyar for respondent.

The Court delivered the following

JUDGMENTS :—*Shephard*, J.—The appellant derives title to the land from Perumal and Muthian by a conveyance of sale, dated the 8th August 1885. In 1883, these persons obtained a decree for the land against Madurai subject to a payment of money to be made to him. Subsequently in the same year they mortgaged the land to the plaintiff for Rs. 190. As regards that sum there is no dispute. On the 3rd August 1885, in consequence of action taken under the decree by Madurai, the plaintiff's brother, Annasami, paid into court the money due to Madurai. Now he seeks to recover it from the appellant, the purchaser of the land. It is not denied that Madurai in regard to his decree was practically in the position of a mortgagee holding an ordinary decree for sale. Now it being clear that the payment was not made at the request or for the benefit of the appellant, the plaintiff can only succeed by showing that he has a charge upon the land which can be enforced against it in the hands of the appellant. Any such charge possessed by the plaintiff must either have existed at the date when the payment was made, or it must have been created on that occasion. It does not

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suit the plaintiff to urge the former view, for the charge which Madurai held vested in the decree which was satisfied by the plaintiff's payment and the plaintiff is not now seeking to enforce the decree. The contention on the plaintiff's behalf, therefore, is that independently of the pre-existing charge, a charge was created in the plaintiff's favour when by his payment into court, he saved the land from sale under the Madurai's decree. Cases were put in which the second mortgagee paying off the prior incumbrance or one of two mortgagors paying off the entire mortgage debt would, owing to the law of limitation or other reasons practically, be without any remedy other than a personal one, unless he could say that a new charge had been created in his favour. The possibility of hard cases does not account for or explain the right which is claimed. The plaintiff's case must be that without knowledge or concurrence on the part of the mortgagee he may by a transaction between himself and the first mortgagee acquire a new right over the property. There is nothing in the Transfer of Property Act to support any such proposition. Sections 74 and 75 are concerned with the relation of prior and subsequent incumbrances. Section 95 relates to the case of one of several mortgagors paying off the whole mortgage money. The language of section 74 makes it clear that the second mortgagee is by tender of the mortgage money to acquire no other rights than that possessed by the first mortgagee. In effect there is deemed to be a transfer of the first mortgage to the second mortgagee. The law secures to the latter the interest which he might have acquired by a conveyance. The same principle as I conceive applies in favour of the mortgagor who has paid off the mortgage debt which his co-mortgagors were equally interested in paying. It is to be observed that Section 95, Transfer of Property Act, does not deal with this case generally. It states that the rule is to be applied only in the case of the mortgagor who has paid the money recovering possession of the property from the mortgagee. The section is evidently taken from Macpherson on Mortgage (See Edition of 1877, p. 145). That section as I understand like the decree which should be framed in the case of redemption by one of two co-mortgagors or a mortgagor interested in part only of the property (See *Pearce* v. *Morris*, Section II, p. 1728) does nothing more than preserve to the mortgagor the right which the mortgagee possessed as against the interest of the other parties in the

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mortgaged property. There is no question in any of these cases of creating a new charge on the property.

It is otherwise when money is expended by a mortgagee in possession for the purposes indicated in section 72 of the Transfer of Property Act which provides that money so expended may be added to the mortgage money. That is what the plaintiff in this case is really seeking to do, although it is not pretended that the disbursement made by him is of such a character as to make that provision of law applicable. Even if the plaintiff had been in possession, I think it would be difficult to hold that the provision in the section relating to salvage of mortgaged property applied to the case, or that in consequence of the payment by him he acquired any further or other interest than that which Madurai might have assigned to him. Inasmuch as the plaintiff is endeavouring to enforce against the land in the defendant's hands, a remedy which he could not have enforced against Madurai, I think the suit must fail. The appeal must, therefore, be allowed and the respondent must pay the costs throughout.

Subrahmania Aiyar, J.—I have arrived at the same conclusion and will add but a few words with reference to the main question, *viz.*, whether the respondent has a lien on the land in respect of the amount to which the appeal relates. There being no statutory provision giving a charge for the payment made in discharge of the amount due to Madurai and others according to the decree whereunder they had a lien on the land for that amount, is there any other foundation for the contention that the respondent has a charge for the sum in question? No doubt, as against the persons who mortgaged the land to the respondent he was entitled to add what was paid by him to the prior incumbrancers, Madurai, &c., to the amount advanced as the consideration for the respondent's mortgage as will be seen from an observation of the Judicial Committee in *Nagendar Chunder* v. *Sremattee Kaminee Dossee* wherein Lord Romilly points out that the plaintiff there who is not stated to have been a mortgagee in possession had a right to tack to the mortgage the amount of the revenue paid by her to save the estate. 11 M. I. A. at 259. See also *Leslie* v. *French,* 23 Ch. D. at p. 560. But as the mortgage to the respondent was partly a usufructuary mortgage and he never obtained possession of the

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mortgaged property, he has according to the Full Bench decision in *Arunachalam Chetti* v. *Ayyavayyan,* I.L.R., 21 M., 476, no charge on the mortgaged property for the money recoverable by him under S. 68 of the Transfer of Property Act. The amount to be added thereto consequently stands also on the same footing, and the respondent's contention that he has a charge for it is therefore clearly unsustainable (compare *Anandi Ram* v. *Dur Najat Ali Begum,* I.L.R., 13 A., 195.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Moore and Mr. Justice O'Farrell.

Alwar Ayyangar and others ... ... Appellants * (*Plaintiffs* 3, 4 and 5).

v.

Krishnamachariar ... ... Respondent (*Defendant*).

Alwar Ayyangar *v.* Krishnamachariar.

Act XX of 1863, Ss. 8 and 10—Appointment of a member of the Devasthanam Committee—Suit to cancel—Religion—Sect—Practice—Vakil's fees—Rules under Legal Practitioners' Act, Rules 31 (*a*), 31 (*b*) and 32.

Where a Vadagalai was appointed a member of the Devasthanam Committee and the appointment was contested in a regular suit on the ground that the temples of the District were mostly of the Tengalai persuasion:—

Held, that the word "religion" in S. 8 of Act XX of 1863 did not mean "sect" and that the appointment of the member who was of the same *religion* though not of the same *sect* as the temple, was legal and valid.

Where a written statement had been put in and the suit was decided after contest but the Court did not go into the merits of the case:—

Held, that the case did not fall under either Rule 31 (*b*), or 32 of the Rules framed under the Legal Practitioner's Act and that it was competent to the Court to award full vakils' fees under Rule 31 (*a*).

Appeal from the decree of the Temporary Subordinate Judge's Court at Tinnevelly in O. S. No. 1 of 1898.

The facts so far as they are necessary for the purpose of this report appear from the judgment.

R. Shadagopachariar for appellants.

V. Krishnaswami Aiyar for respondent.

The Court delivered the following

JUDGMENT:—This is an appeal against a decree of the Temporary Subordinate Judge of Tinnevelly dismissing a suit brought to cancel as illegal an order of the District Judge of Tinnevelly passed under the provisions of S. 10, Act XX of 1863, appointing the defendant a member of the Vishnu Devasthanam Committee of the Tinnevelly District. The sole ground on which the appointment is said to be illegal is that the defendant is a

* A, No. 213 of 1898. 27th April 1899.

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member of the Vadagalai sect while the majority of the temples in the District in fact, all with one exception, are alleged to be Tengalai temples.

The Subordinate Judge without going into the questions of fact dismissed the suit on the ground that no suit will lie to set aside the order of the District Judge. It is first argued in appeal that this view is erroneous; that there is a right vested in the Tengalais by custom to have none but members of their sect represented in the Committee and that on general principles a suit will lie to remedy the infringement of that right.

Assuming that, as suggested in *Minakshi* v. *Subramanya*, I. L. R., 11 M. 201, a suit may lie to cancel a District Judge's order under S. 10 of Act XX of 1863, where the appointment is manifestly improper—a point on which we desire to express no opinion, the question still remains whether in the present case any sufficient cause has been made out in the plaint to found the plaintiffs' suit. In our opinion there is no such ground. The section which is relied upon by the appellants' vakil (Section 8) provides that the members of the Committee should be appointed from persons professing the religion for the purposes of which the mosque or temple was founded or is maintained. The present attempt to narrow the terms of the section by substituting the word "sect" for "religion" is in our opinion entirely unwarranted. The District Judge's order appointing the defendant is, therefore, perfectly legal.

The only other point raised is that the Subordinate Judge should not have awarded full vakils' fees, the suit not having been heard on the merits. In this case a written statement was put in and the suit decided after contest and the case does not fall under either Rule 31 (*b*) or 32 of the rules framed under the Legal Practitioners' Act.

We think it falls under Rule 31 (*a*) and that the fees were properly calculated.

The appeal accordingly fails and we dismiss it with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Moore.

Alwar Iyengar and others ... Appellants* in S. A. No. 966 of 1898 (*Defendants* 1, 4 and 5)

v.

Zelleveger and others ... Respondents (*Plaintiff* and *Defendants* 2 and 3).

Alwar Iyengar *v.* Zelleveger.

Civil Procedure Code, S. 335—Summary order as to title—Regular suit—Art. 11 of the Limitation Act—Construction of order.

Where a court has expressed no opinion as to the question of title raised by a claimant under S. 335 of the Civil Procedure Code, a regular suit by the claimant to establish title is not governed by Art. 11 of the Limitation Act and is not barred, if not brought within one year from the date of the order.

Where the executing court in investigating a claim under S. 335, C. P. C., did not take any evidence, but only referred to the decision in a case of criminal trespass and an order on a claim petition presented by a predecessor in title of the plaintiff, and without saying that on the strength of the two documents it formed a definite opinion as to the respective claims of the parties concerned wound up the order with the words "Under these circumstances, I think it is useless to hold a summary inquiry as to the present possession of the land":—

Held:—that the reasonable construction of the order was that the court for some reason or other declined to deliver a decision on the claim submitted for its consideration.

Second appeal from the decree of the District Court of Tinnevelly in A. S. No. 137 of 1897 presented against the decree of the Court of the District Munsif of Tuticorin in O. S. No. 235 of 1896.

The necessary facts appear from the judgment.

V. Krishnasawmi Aiyar and *R. Sivarama Aiyar* for appellants.

R. Thomson, K. Brown and *T. Rangachariar* for 1st respondent.

The Court delivered the following

JUDGMENT:—The finding of the District Judge as to the plaintiff's title to the land being a finding on a question of fact, must be accepted. It was, however, urged for the defendant (appellant) that as no suit was brought within a year from the date of the order (Exhibit XVII) to set it aside the present suit should be

* S. A. No. 966 of 1898 17th March 1899.

Alwar Iyengar v. Zelleveger.

held to be barred under Art. 11 of the Limitation Act. That order was, no doubt, passed with reference to a complaint of obstruction made under S. 335 of the Civil Procedure Code, by the person through whom the defendants trace their title against a party through whom the plaintiff claims. It is also true that the court directed the delivery of the property to the purchaser at the execution sale in spite of the objection raised to such delivery. The question, however, is whether the order can be properly held to be one made under S. 335 so as to require it to be set aside within a year by the party against whom it was passed. As in cases arising under S. 283 of the Civil Procedure Code, so in cases falling under S. 335, if an order is passed after investigation the fact that the investigation was not as complete as it might have been under the circumstances would not prevent the order unless it is set aside within the time limited as operating as conclusive against the party affected by it. But to render an order under either of the sections referred to so operative, it is essential that the court passing it should have arrived at a definite conclusion as the matter to be decided under the particular provision of the law under which the court is acting (see *Munisami Reddi* v. *Arunachala Reddi*, I. L. R., 18 M., 265). In the present instance we think that the District Munsif, who passed the order (Exhibit XVII), did not arrive at any such conclusion. Admittedly he examined no witnesses on behalf of either of the contending parties, nor does he appear to have received and filed any documentary evidence. He merely refers to a decision in a case of criminal trespass relating to the land and to the fact that the land had once before been attached for arrears of revenue due by the Pattadar, the plaintiff's vendor, but subsequently it was released from the attachment on an objection raised by the person through whom the defendant claims. He does not, however, say that on the strength of these circumstances he formed an opinion one way or the other with reference to the questions as to which the parties were at issue. On the contrary, after adverting to the circumstances just referred to the order concludes thus: "Under these circumstances, I think it is useless to hold a summary enquiry as to the present possession of the land". It is possible the Munsif meant to say that he did not think it necessary to take more evidence. But so to construe the part of the order quoted above would, it seems to us, be a mere surmise. The

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reasonable view would seem to be that the District Munsif for some reason or other declined to give a decision on the matter on which he has to decide under the section. If this view is correct, it follows that the order is not one that required to be set aside by a suit. We, therefore, agree with the conclusion of the District Judge on the point.

It was next urged that the suit was at all events barred under article 144 of the Limitation Act. But we take that the District Judge came to the conclusion that the possession of the land passed to Mr. Milligan in 1890. There was no adverse possession for a continuous period of 12 years on the part of those through whom the defendants claim so as to give them a prescriptive title. The second appeal fails and is dissmissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Boddam.

Bavanna and another ... ... Appellants* (*1st & 2nd Defendants*)

v.

Balagurivi and others ... ... Respondents (*Plaintiffs*).

Bavanna v. Balagurivi.

Transfer of Property Act, Ss. 72, 74—Usufructuary mortgage—Payment of a prior mortgage—Redemption of the usufructuary mortgage—Subsequent suit to recover money paid.

Where a usufructuary mortgagee paid off a prior mortgage-decree and suffered a decree for redemption without insisting on the payment of the amount so paid to the prior mortgagee, and subsequently brought a regular suit for its recovery :—

Held, that if by payment of the prior mortgage-decree he acquired any rights under S. 74 of the Transfer of Property Act, his remedy was to proceed in execution, and, if he acquired any rights under S. 72, his remedy was to insist on being paid in full before he could be turned out of the lands, and that in either case a separate suit for the recovery of the money could not be sustained.

Second appeal from the decree of the District Court of Ganjam in A. S. No. 305 of 1897, affirming the decree of the District Munsif of Sompeta in O. S. No. 262 of 1896.

In 1879, the plaintiff and the 3rd defendant's father purchased certain lands from the 1st and the 2nd defendants. In 1882, a prior

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* S. A. No. 488 of 1898. 20th March 1899.

Bavanna v. Balagurivi.

mortgagee sued to recover the money due on his mortgage and obtained a decree against both the vendors and the vendees. The plaintiff then paid the money (Rs. 143) due under that decree. In 1895, the 1st and the 2nd defendants, alleging that the transaction of 1879 was not a sale but only a mortgage, brought a suit for redemption. The plaintiff and the 3rd defendant then contended that the transaction was really a sale; but their contentions were overruled. The plaintiff then urged that the 1st and 2nd defendants should not be allowed to redeem, except upon payment of the Rs. 143 paid by him to the prior mortgagee in addition to the money due on their mortgage of 1879. But the District Munsif thought that he could not go into that question then and referred the plaintiff and the 3rd defendant to a regular suit. Hence this suit to recover the money paid to the prior mortgagee (the 3rd defendant having refused to join as plaintiff was made a defendant in the case). The defendants 1 and 2 contended that the suit was barred by limitation and *res judicata*.

The District Munsif held that, after payment of the prior mortgage, the plaintiff and 3rd defendant were in possession of the property in respect of both mortgages, that the defendants should have sued to redeem both mortgages which they did not, that the prayer of the plaintiff to add this sum to the decree amount was rejected by the District Munsif in the other case, that, therefore, the cause of action could not be said to have arisen till 1895 when the transaction of 1879 was decided to be a mortgage and the plaintiff was ousted from the lands, and that the suit was not barred by limitation. He, therefore, decreed the plaintiff's claim. On substantially the same grounds, the District Judge affirmed the judgment. Hence this second appeal.

P. R. Sundara Aiyar for appellants.

J. G. Kernan for 2nd and 3rd respondents.

The Court delivered the following

JUDGMENT:—If by paying off the mortgage the plaintiff obtained any right under S. 74 of the Transfer of Property Act, his remedy was to proceed in execution. If he obtained any right under S. 72, the right he acquired was to add the amount to his own debt. His mortgage was a usufructuary mortgage, and his only

right was to insist upon being paid in full before he could be turned out. This is not a case where we can say that the plaintiff was turned out unlawfully; and the suit appears clearly to be one which cannot be sustained. The mistake appears to have arisen owing to adopting the advice of the Munsif instead of appealing from his decision. The second appeal is allowed, and the plaintiff's suit is dismissed. No costs. Bavanna v. Balagurivi.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. H. H. Shephard, Officiating Chief Justice, and Mr. Justice Moore.

Douglas Grant ... ... Appellant* (*Plaintiff*).

v.

N. Subrahmanyan ... ... Respondent (*Defendant*).

Douglas Grant v. N. Subrahmanyan.

Civil Procedure Code S. 295—Rateable distribution—Same judgment-debtor—Transfer of Property Act, S. 99—Money-decree on mortgage—Sale in execution.

Where the property of a person was sold at the instance of a decree-holder and the sale-proceeds were deposited in Court, every person having a decree against the same person is entitled to rateable distribution of the amount under the provisions of S. 295 of the Code of Civil Procedure; and the fact that the decree-holder at whose instance the property was brought to sale held the decree not only against that person, but jointly and severally against him and his co-defendant in the case, does not exclude, the claim to rateable distribution of another creditor who had his decree solely against that person.

Where in execution of a mere money-decree upon a mortgage, the mortgagee obtained an order for the sale of the mortgaged property giving him the same rights, against the sale-proceeds as he had against the property, and a subsequent money decreeholder applied for and obtained rateable distribution of the sale-proceeds:—

Held, in a suit by the mortgagee against the subsequent decreeholder for a refund of the money so distributed to him, that the order for sale at the instance of the mortgagee-money-decreeholder was illegal under S. 99 of the Transfer of Property Act, that the clause in the order giving the mortgagee the same right against the sale-proceeds as he had against the property sold was void and of no effect as against the defendant who was no party to the order, that both decrees being only money-decrees, the order directing rateable distribution was rightly made, and that the plaintiff's suit should be dismissed.

Appeal from the decree of the High Court of Madras (in the exercise of its original jurisdiction) in C. S. No. 1 of 1898.

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* O. S. Appeal No. 25 of 1898, 8th September 1898.

Douglas Grant v. N. Subrahmanyan.

One S. T. Krishnamachariar brought a suit, O. S. 378 of 1880, upon a mortgage executed by the Zemindar of Karvetnagar and his son and obtained a money-decree for the sum of Rs. 1,41,872-2-6. In the year 1884, the Zemindar died, and his son succeeded to his place. The decreeholder in O. S. 378 subsequently filed an execution petition No. 12 of 1885 in the District Court of North Arcot, to which the decree had been transmitted for execution, praying for the attachment and sale of the properties mortgaged to him. This application for execution was made against the new Zemindar as judgment-debtor in the original suit, but no step was taken to bring him in as representative of the previous Zemindar, who was also a judgment-debtor under that decree. The plaintiff who was appointed a receiver in a subsequent suit (O. S. 148 of 1885) put in a miscellaneous petition No. 633 of 1888 in the said execution petition 12 of 1885, and prayed for a sale of the property, giving him the same rights as such receiver against the proceeds as he had against the property sold, and this prayer was granted. Under this order some property was sold and the sale-proceeds were deposited into Court. In 1889, the defendant obtained a decree against the new Zemindar for over Rs. 19,000, and successfully claimed rateable distribution as against the plaintiff, of the amount deposited into Court. This order directing rateable distribution, the plaintiff contended, was illegal, because the District Court had already passed an order on C. M. P. 633 of 1888, giving the receiver a prior charge over the sale-proceeds, because the decrees in the two suits were not against the same defendants, and because the late Zemindar's debts were prior charges on the estate which had descended from the late Zemindar to the present one. The plaintiff, therefore, prayed that the defendant might be directed to refund the money illegally distributed to him.

On the other hand, the defendant contended that the decree in O. S. No. 378 of 1880 was only a money-decree and did not confer any greater right on him than what the defendant had under his decree in O. S. No. 8 of 1889, that the order of the District Judge on the miscellaneous petition 633 of 1888 was illegal and could not avail against the defendant who was no party to the order, and that the order directing rateable distribution was rightly made and could not be set aside.

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Boddam, J., held that the money was rightly distributed and dismissed the plaintiff's suit. Hence the appeal.

K. Brown and *Wilson and King* for appellant.

The Advocate-General (*Arnold White*) and *Messrs. Branson and Branson* for respondent.

The Court delivered the following

JUDGMENT :—*The Officiating Chief Justice.*—The plaintiff in order to recover has to show that the defendant was not entitled to receive the money paid to them in the distribution of the proceeds of the sale which took place in 1895.

The first question is whether the judgment-debtor against whom the defendant holds a decree is the same within the meaning of S. 295, as the judgment-debtor against whom the decree in which the plaintiff is interested was passed. This latter decree obtained in 1880 was made against the late Zemindar and his son, the present Zemindar. In 1884, his father died, and in 1899, the defendant obtained a decree against the present Zemindar. Meanwhile, in December 1888, application for execution of the decree of 1880 was made in the District Court of North Arcot on behalf of the plaintiff. It was stated therein that the late Zemindar was dead, that the present Ziminda was the legal representative, and that the mortgaged property of which sale was required was then enjoyed by the present Zemindar. No special application and no special order seems to have been made under S. 234 of the Code. No attempt was made to realize the property as assets of the late Zemindar. It was simply the property of the present Zemindar, one of the judgment-debtor, that was to be sold.

Under these circumstances, I am clearly of opinion that S. 295, applies. The only judgment-debtor under the decree of 1880, with whom we are concerned, is the individiual who is judgment-debtor under the other decree. It is immaterial that in the first suit he had a co-defendant against whom the decree might have been expressly executed. It seems to me a mistake to say that there is a conflict between the cases reported in 9th and 12th Calcutta. *Farran*, J., in *Nimbaji Tulsiram* v. *Vadia Venkati*, I. L. R., 16 B., 687, shows how they may be reconciled, and I adopt his statement of the law.

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The next contention on behalf of the appellant is that in consequence of the order of the District Judge, dated 11th March 1889, directing that the sale be made free of the mortgage, and that the receiver should have the same rights against the proceeds as against the property, the case is one in which the proviso (b) to section 295, comes into force, and accordingly no order for rateable distribution ought to have been made. If the order of 11th March 1889 was a valid and proper order, this contention must be sound. As between the judgment-debtor and the purchasers the order may be conclusive. The sale which took place in pursuance of it has not been questioned by either of them, and cannot be questioned in the present suit, because neither the purchaser nor the judgment-debtor is before the Court. The sale is an admitted fact, but it does not follow that the defendant is bound by the terms of the order under which the sale was effected. If those terms instead of being embodied in the order had been made the subject of a mere agreement between the decree-holder and the judgment-debtor, it is plain the other judgment-creditors would not have been prejudiced thereby. They cannot by any such agreement be deprived of the benefit of the provision which S. 295 of the Code of Civil Procedure makes for their protection. Seeing that the order was entirely illegal, being made in contravention of the 99th section of the Transfer Property Act, I think that those terms of it of which the plaintiff seeks to take advantage can have no other force than they would derive from the agreement of parties. If the plaintiff had not possessed a mortgage interest, the order for sale omitting the terms in question would have been a legal one. What the defendant asks is that he should not be in a worse position than he would be in if such a legal order had been made. Such terms of the order as are based on the existence of the plaintiff's mortgage, even according to the defendant's contention, are terms which the District Court had no power to impose, and, therefore, should not be considered to have any judicial force. In my opinion this is the right view of the matter, and the order of the 11th March 1889 in so far as it recognizes the plaintiff's mortgage is not valid or binding as against the defendant. In this view of the case it is unnecessary to consider whether proviso (b) to S. 295, which was enacted before the Transfer of Property Act came into force and applies to moveable as well as immoveable property, affects the case of a mortgage

held by the decree-holder himself, nor is it necessary to consider the question whether the remedy on the mortgage was lost by limitation, or by the fact that a suit had previously been brought upon it.

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For the reasons already stated, I think the suit was rightly dismissed, and I would dismiss the appeal with costs.

Moore, J.—I concur.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Shephard and Mr. Justice Subrahmania Aiyar.

Krishna Doss Balamukunda Doss ... Appellant* (*Plaintiff*)

v.

Guruva Reddi ... ... Respondent (*Defendant*).

Rent Recovery Act, Ss. 9 and 51—Tender of patta—Refusal to accept—Second tender—Limitation.

Krishna Doss Balamukunda Doss v. Guruva Reddi.

A landlord may within the fasli tender a second patta if he thinks that the first was improper; and a suit to compel the acceptance of such amended patta is within time if brought within two months of its date.

Second appeal from the decree of District Court of North Arcot in A. S. No. 162 of 1897, reversing the decree of the Head Assistant Collector of North Arcot in summary suit No. 746.

A landlord first tendered a patta on the 11th January, 1895. Defendant refused to accept it. A modified patta was tendered on the 28th of June 1895, and this suit was filed on the 27th of August 1895. The defendant contended that since the suit was not brought within a month of the date of the refusal to accept the first patta, the suit was barred by limitation. They also contended that the patta was improper in many respects. The Head Assistant Collector held that the suit was not barred and passed a decree for the plaintiff with certain modifications. On appeal, the District Judge held that though there was nothing in Act VIII of 1865 to exclude the tender of a second patta, the only reasonable meaning that could be attached to the provisions of the Act was that there should be only one tender and that the suit should be brought within one month of the date of the refusal to accept such tender.

* S. A. No. 831 of 1898. 8th March 1899.

Krishna Doss Balamukunda Doss *v.* Guruva Reddi.

He, therefore, dismissed the plaintiff's suit. Hence this second appeal.

V. Bhashyam Aiyanger, V. C. Desikachariar and *E. Venkatarama Sarma* for appellant.

N. Subrahmanyam for respondent.

The Court delivered the following

JUDGMENT:—It seems to us impossible to hold that there is no case in which a landlord may, in the course of the fasli, tender a second and amended patta. In this case where the patta first tendered was defective and the landlord discovering the mistake tendered an amended patta, it would be most unreasonable to say that the refusal to accept the amended patta does not give a cause of action. To hold that a second patta can never be tendered in substitution for one tendered by mistake would mean that the landlord must go to Court, though fully aware that the patta tendered by him was erroneous. Again, in the case where the question of the lawfulness of a distraint is raised, it cannot be doubted that the Court would look at the corrected patta and not hold that the distraint was unlawful, because the original patta was irregular. The peculiar nature of the correlative rights of landlord and tenant have to be borne in mind. Neither can enforce the terms of the contract of tenancy against the other without satisfying a condition precedent.

The landlord has to tender a proper patta and the tenant on his side to accept it. The landlord has till the end of the fasli time to tender the patta and the tenant has the same period in which he may accept it, or may on his side file the suit under S. 8 of the Act. Either party may in anticipation declare that he will not accede to the demand made by the other party, and the latter thereupon, no doubt, has a cause of action, but as in the case of contract it is not incumbent upon one party to treat such a declaration as a breach and to sue upon it immediately instead of waiting until the due date for performance has arrived; so in this case, we are disposed to think the landlord may wait till the end of the fasli and is not bound to found the action on a refusal to accept which the tenant may retract and may not persist in till the end of the fasli. Otherwise the anomaly might arise that while the landlord might by

lapse of time have lost his right of compelling the tenant to accept a patta, the tenant might still be in a position to demand a patta. It is not necessary to say what the decision should be in a case in which, there having been a refusal on the tenant's part more than two months before the expiration of the fasli, the landlord brought the suit after that date.

Krishna Doss Balamukunda Doss v. Guruva Reddi.

In the present case, a fresh demand was made just before the end of the fasli and the suit was brought within two months.

The landlord in making the tender was only doing what he might have been compelled to do. Under those circumstances, we think it is impossible to hold either that the tender should be disregarded as if it had never been made or that the tenant's refusal does not give rise to a cause of action.

We must reverse the judgment and send the case back for disposal on merits.

Costs to follow result.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Moore.

Mahomed Esuph Ravuttan ... ... Appellant* (*Defendant*)

v.

Pattamsa Ammal ... ... Respondent (*Plaintiff*).

Mahomed Esuph Ravuthan v. Pattamsa Ammal.

Mahomedan Law—Gift by husband to wife—Gift for consideration or *Hebabil Ewaz* possession.

A gift by a man to his wife is no exception to the general rule of law that to constitute a valid gift actual possession or such possession of the thing given, as the nature of the case will admit, should pass to the donee. *H. M. Azim Unnissa v Clement Dale*, 6 M. H. C. R., 455, referred to.

Where a gift was made by a Mahomedan to his wife in consideration of the wife releasing her claim to dower:—

Held, that it was a gift for consideration or *Hebabil Ewaz* known to the Mahomedan Law and that it was valid even without transmutation of possession, *Khajooroonissa v. Rowshan Jahan*, I. L. R., 2 C. (at 197), followed.

Second appeal from the decree of the Subordinate Judge's Court of Kumbakonam in A. S. No. 646 of 1897, affirming the

* S. A. No. 1316 of 1899. 13th April 1899.

Mahomed Esuph Ravuthan v. Pattamsa Ammal.

decree of the District Munsif of Tiruturaipundi in O. S. No. 374 of 1896.

The necessary facts appear from the judgment.

V. Krishnaswami Aiyangar for appellant.

V. Krishnaswami Aiyar for respondent.

The Court delivered the following

JUDGMENT:—The District Munsif holds that Exhibit A is a gift, that possession was not transferred by the husband to his wife but that it has been held that in the case of a gift by husband to a wife actual transmutation of possession is not necessary, and he refers to the decision in *H. M. Azim Unnissa* v. *Clement Dale*, 6 M. H. C. R. 455. What, however, was there held was that all that was necessary to render a gift by a Mahomedan husband to his wife valid was that it should be accompanied with such a change of possession as the subject was capable of and as was consistent with the continuance of the relation of husband and wife. In a case where, for example, a husband made a gift of the house in which he and his wife were living together and after the gift they both continued to reside in the building it might be held that the gift was accompanied with such change of possession as was consistent with the continuance of the relation of husband and wife between the donor and donee. In the present case, however, it is shown that the husband and wife separated almost immediately after the gift was made, that the subject matter of the gift was land, and that the donee never got possession of these lands in any way or received any of the produce obtained from them.

It is not easy to see how it can be said that any possession passed. The Subordinate Judge holds, in our opinion rightly, that the transaction evidenced by Exhibit A constituted what is known as '*Hebabil Ewaz*' or a gift for consideration. That in such a case transfer of possession is unnecessary is clear from the Privy Council case, in *Khajooroonissa* v. *Rowshan Jahan*, I. L. R., 2 C., 184 (at 197) cited for the respondent. The Mahomedan Law rules relating to sales or exchanges, on which the appellant's vakil laid much stress, have really no bearing in a case like this. *Hebabil Ewaz* is shown to be a real transaction and it is

unaffected by undue influence, fraud or the like. All that has to be shown to support the transaction is, as will be seen from the case already referred to, the actual passing of the consideration agreed to be given. That such was the case in the present instance cannot be denied, since the consideration moving from the respondent was the release by her of the right to dower which she was entitled to get from the appellant, her husband, and that release was complete when the transfer in question was accepted by her.

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The second appeal fails and is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Moore.

Nanu Iyer and another ... Appellants * (*Plaintiffs*)

v.

Tulasi Vandayan and another ... Respondents (*Defendants* 1 and 2).

Nanu Iyer v. Tulasi Vandayan.

Lessor and lessee—Execution purchaser from lessee—Ignorance of lease—Privity of estate—Liability for rent—Mesne profits.

A purchased the undivided $\frac{1}{6}$th share of a coparcener in a Hindu family and let it on lease to the person himself. B purchased the same property in execution of a decree against the coparcener in ignorance of the limited character of his interest in it. In a suit by A against B and the members of the family for the recovery of $\frac{1}{6}$th of the properties and mesne profits :—

Held, that A was entitled to a division and delivery of the $\frac{1}{6}$th share of the properties, that there was no privity of estate between A and B, that, therefore, B was not liable to pay rent to A, but that B was liable to pay mesne profits on the portion of the lands in his possession that might fall to the plaintiff's share on partition.

Second appeal from the decree of the District Court of Tanjore in A. S. No. 821 of 1897, presented against the decree of the Court of the District Munsif of Tiruvalur in O. S. No. 131 of 1895.

This was a suit for the recovery of plaint-mentioned lands with mesne profits. The material facts of the case are as follows: The defendants 1 and 3 to 7 are coparceners. The 1st defendant conveyed his undivided $\frac{1}{6}$th share of the family properties in considera-

* S. A. No. 1157 of 1898, 22nd March 1899.

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tion of a debt due by him to the plaintiff with a reservation of his right to redeem the property on payment of the money on a certain date. However, the 1st defendant remained in possession of the properties and executed a *swamibhogam* deed whereby it was provided that should the plaintiff incur any loss by the 1st defendant's failure to pay rent or otherwise, the plaintiff might give notice of cancellation of the *swamibhogam* deed and enter upon the lands immediately. The 2nd defendant obtained a decree against the 1st defendant and in execution of it brought the property to sale and purchased it on the footing that it was the absolute property of the 1st defendant. He subsequently established his right as such purchaser in a suit against the 1st defendant's coparceners and was in enjoyment of the portion of the properties he recovered in that suit. The 1st defendant made default in the payment of rent and the plaintiff gave notice of his intention to throw up the *swamibhogam* deed and brought this suit to recover ⅙th of the properties with mesne profits. He also impleaded the coparceners of the 1st defendant as parties to the suit on the ground that they were in possession of some of the properties.

The District Munsif gave him a decree for the lands against all the defendants, but confined his claim for rent to the 1st defendant only. On appeal, the District Judge modified the decree by limiting the 2nd defendant's liability to ⅙th of the lands in his possession. Hence this second appeal.

V. Krishnaswami Aiyar for appellants.

C. R. Pattabhirama Aiyar and *S. Raghava Aiyangar* for 2nd respondent.

The Court delivered the following

JUDGMENT:—*Subrahmania Aiyar,* J.—It was strongly contended on behalf of the appellants (plaintiffs) that the 2nd respondent (2nd defendant) also should have been made liable for the rent (*swamibhogam*) and interest which were payable under the lease, Exhibit D, executed to the appellants by the 1st respondent and which were decreed against the latter. The ground urged was that inasmuch as the 2nd respondent had become the purchaser in a Court sale of the right, title and interest of the 1st respondent in the lands that belonged to him and his coparceners, the 2nd res-

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pondent should be treated as the assignee from the 1st respondent and held liable for the amount in dispute. It is established that when the 2nd respondent made the purchase he had no notice that the 1st respondent held but as lessee, that he believed he was acquiring not the interest of a lessee but an absolute title, that he litigated with the 1st respondent's coparceners on that footing, obtained a decree as owner for the land now occupied by him, and has ever since held possession of it as such. In these circumstances, it is clear that the appellants' contention cannot be accepted. Now the ground on which an assignee from a lessee is responsible to the lessor for rent payable under the demise is that there is between them a privity of estate. Such privity cannot, however, be said to subsist between the party called upon to pay rent and the party claiming it when the former never purported to hold under the latter. No doubt in certain cases it is open to the Courts to imply, from circumstances connected with the occupation, that the relation of landlord and tenant exists between the occupier and the owner. But that relation will not and cannot be implied when the acts and conduct of the parties are inconsistent with its existence. The 2nd respondent not having recognised the appellants at any time as his landlords, the possession of that respondent was not the possession of one holding in privity with the appellants, but with reference to them that of a trespasser—compare the observation of the Judicial Committee in *Srimati Anand Mayi Dasi* v. *Dharandra Chandra Mookerjee* at p. 127, 8 B. L. R.—and it follows that the 2nd respondent is not liable to them for the *rent* and *interest* claimed. The lower Courts nevertheless ought not to have exonerated him altogether. He should have been held liable to pay mesne profits to the appellants for a period of 3 years prior to the date of the plaint as also subsequent profits to the extent to which he may eventually be found responsible. As to the other point also urged on behalf of the appellants, the decision of the lower appellate Court cannot be upheld. Both the Courts having decided that the appellants are entitled to a sixth share out of all the lands held by the 1st respondent and his coparceners jointly, the question as to the particular parcels of land to be allotted to the appellants for their share must have been left to be determined at the actual partition to be made under the present preliminary decree. The lower appellate Court was not, therefore, justified in holding that the appellants were

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entitled only to 2 mahs of land out of the 12 mahs in the possession of the 2nd respondent. The decree of the lower appellate Court will, therefore, be reversed and that of the District Munsif restored, with the modification that the 2nd respondent must pay to the appellants mesne profits from April 1892 up to the date of delivery or 3 years from the date of the decree (whichever is earlier) with reference to the 12 mahs in his possession should the whole of that extent be eventually allotted to the appellants' share, or with reference to so much thereof as might be allotted to that share. The costs of the appellants in the lower appellate Court must be paid by the 2nd respondent. But in this Court each party will bear his costs.

Moore, J.—I concur.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Moore.

Periathambi Bommiah ... ... Appellant * (*Plaintiff*)

v.

Chithambaram Chettiar ... ... Respondent (*Defendant*).

Periathambi Bommiah v. Chithambaram Chettiar.

Revenue Recovery Act II of 1864, Ss. 38 and 59—Revenue sale—Suit to set aside—Jurisdiction—Omission to put up notice of sale in the Collector's Office—"Material" irregularity.

Where under the 1st clause of S. 38 of Act II of 1864 an application was made to the Collector to set aside a revenue sale on the ground of irregularity, and the Collector refused to interfere on the ground that the irregularity was not material and was not proved to have caused any loss:

Held, that under S. 59 of the Act the District Court had jurisdiction to entertain a suit to set aside the sale.

Held, also that in such a suit the Court could not give relief on the mere ground of irregularity without further proof that it was a material one and had caused substantial injury to the plaintiffs.

The omission to put up a notice of the sale at the Collector's Office, which is far away from the scene of the revenue sale, cannot be said to have led to a paucity of bidders at the place of auction and to have occasioned a fall in the price of the properties sold.

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* A. No. 226 of 1898, 14th April 1899.

Periathambi Bommiah v. Chithambaram Chettiar.

Appeal from the decree of the District Court of Coimbatore in O. S. No. 7 of 1898.

The facts appear from the judgment of *Moore, J.*

C. Sankaran Nayar for appellant.

V Bhashyam Aiyangar and *T. Rangaramanuja Chariar* for respondent.

The Court delivered the following

JUDGMENT :—*Moore, J.*—The village of Erumarapatti was sold on the 30th August, 1897, on account of arrears due by the Zemindar of Andipatti. Application was made to the Collector to set aside the sale, under the first clause of Section 38 of Act II of 1864, on the ground that there were material irregularities in connection with the sale, and that in consequence of such irregularities the Zemindar had sustained substantial injury. The Collector found that one irregularity, the omission to post a certain notice in his office, had been proved, but held that this was not a serious irregularity, and also that although the village had been sold for less than its full value, yet that the price realised was not so much below the value as to justify him in setting aside the sale. He accordingly rejected the petition of the Zemindar (plaintiff-appellant) who thereon filed a suit to set aside the sale, the auction-purchaser alone being made the defendant (respondent). The District Judge held that the notice of sale was not posted up in the Collector's Office, that this was an irregularity, but that it did not furnish sufficient ground for setting aside the sale and also decided that he had no jurisdiction to entertain the suit.

It appears to me that the District Judge had jurisdiction to entertain this suit. Section 38, clause 1, Act II of 1864 (Madras) provides that application may be made to the Collector to set aside a sale of immoveable property on the ground of some material irregularity in publishing or conducting it, but lays down that "except as otherwise is hereinafter provided" no sale shall be set aside on the ground of irregularity, unless the applicant proves that he has sustained substantial injury by reason thereof. Much has been said at the hearing of this appeal as to the meaning of the words "except as otherwise is hereinafter provided," but I think that

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there can be no reasonable doubt that they refer to the action which the Collector can take *suo motu* under the latter part of clause 3 of this section; and that they must consequently be excluded from consideration in determining the question which arises in the present suit, namely, whether an applicant whose petition under the first clause of the section has been rejected has any remedy. It appears to me that he has such remedy under S. 59 which provides that nothing in the Act shall be held to prevent parties deeming themselves aggrieved by any proceedings under the Act from applying to the Civil Courts for redress. Here the plaintiff (appellant) considers himself aggrieved, because the Collector refused to set aside the sale and he is, in my opinion, entitled to ask a Civil Court to decide if he is entitled to redress.

The District Judge has held that there was an unimportant irregularity in connection with the sale, but that it did not cause the appellant substantial loss. It is contended on behalf of the respondent that if these findings are upheld the appeal must be dismissed. The pleader for the appellant, however, urges that although clause 1 of Section 38 provides that the Collector cannot set aside a sale on an application being made to him to do so, unless it is shown that there was an irregularity connected with it which caused the applicant substantial loss, yet that a Civil Court can cancel the sale on proof of any irregularity, whether it has caused loss or not. It does not appear to me that it is possible to accept this argument. It is S. 59 that gives the appellant his right to sue, and that section provides that it is only when he has been aggrieved by proceedings taken under the Act that he is entitled to redress. He cannot be held to be aggrieved, because the Collector did not on proof of an irregularity set aside the sale notwithstanding that substantial loss had not been caused, inasmuch as clause 1 of Section 38, under which the Collector has acted, does not empower him to cancel a sale without proof of substantial injury. The only question that remains for consideration is as to whether it has been shown that any irregularity proved to have been committed in connection with the sale caused the appellant substantial loss. The only irregularity that I can hold has been proved is the one admitted by the Collector, namely, that the notice of sale was not posted up in his office. The evidence given by the plaintiff and his

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being taken against him. Nothing of the kind, however, can happen, in consequence of the defect of procedure, which is established here and which cannot ordinarily result in more than the property sold fetching less than what might have been got for it, had that publicity, which the affixing of a sale notice in the Collector's Office is intended to secure, been given to the sale. The omission in question cannot, therefore, be said to be more than an irregularity, though undoubtedly it is a material irregularity. In this view, is a Civil Court altogether debarred, as held by the District Judge and urged before us by Mr. Bhashyam Aiyangar on behalf of the defendant, from entering into the question of the validity of the sale? Mr. Bhashyam Aiyangar relied on S. 38 of Act II of 1864 in support of his contention. But what does that section really provide? Under paragraphs I and II thereof, a party may apply to the Collector within 30 days from the date of the sale to set aside the sale, on the ground of material irregularity or mistake or fraud in publishing or conducting it, and the Collector can set it aside, if the alleged ground is made out, provided, however, that, when such ground is material irregularity or mistake in the publication or the conduct of the sale, it can be set aside, only if the applicant proves to the satisfaction of the Collector that substantial injury was caused by such irregularity or mistake. Under the third paragraph of the section, it is competent to a Collector to act on his own motion and, if he thinks that the sale ought not to stand, he can set it aside, irrespective of the question—whether substantial injury has been caused by the sale or not. The words which occur in the concluding part of the first paragraph of the section, and on which much stress was laid by Mr. Bhashyam Aiyangar, *viz.*, 'except as hereinafter provided' are inserted there obviously for the purpose of excluding from the operation of that part of the section the case, in which the sale is set aside by the Collector *suo motu*. There is, therefore, absolutely nothing in the section relied on to warrant the view that civil tribunals are entirely debarred from going into the question of the validity of a revenue sale in publishing or conducting which a material irregularity has been allowed to occur. And having regard to S. 59 of the Act, whereby power is reserved to a party aggrieved by any proceeding under the Act, to seek redress in a Civil Court, save as specifically excepted in the enactment and sales like the present not coming within the saving clause,

there can be no doubt that Courts are at liberty to set aside such sales, subject, however, to the condition that the party seeking the relief must establish that he has sustained substantial injury by the irregularity complained of. It is true that no such condition is to be found in the section just cited. But the provision that a party, impeaching a sale, on the ground of material irregularity, cannot have it set aside by the Revenue authority specially empowered to deal with the matter, unless proof of injury, as aforesaid, is given, certainly implies that the party is subject to a similar condition, when he takes proceedings in the matter in a Civil Court. For, what reason is there for considering that proof of injury is essential to the cancelment of the sale by one authority, but not for the cancelment of it by the other? None whatever. Such being the case, it remains to consider, whether the plaintiff has made out that the omission to put up the notice in the Collector's Office has caused him such injury as is required by the law before a sale can be set aside. It must be admitted that the sum of Rs. 5,300, for which the village was knocked down to the defendant, is less than its probable value, which might well be taken at about Rs. 8,000 (Exhibit C). No doubt, as pointed out by Mr. Sankaran Nair, in cases like this, direct evidence is not necessary to connect the inadequacy of the price realised with the material irregularity proved and the relation of cause and effect between the two may be inferred, where such inference is reasonable from the nature of the irregularity and the extent of the inadequacy of the price (*Gur Buksh Lall* v. *Jawahir Singh*, I. L. R., 20 C., at p. 604; see also *Venkatasubbaraya Chetti* v. *Zemindar of Karvetinagar*, I. L. R., 20 M. 161). Turning, however, to the irregularity here, to say that the non-publication of the notice at Coimbatore—the Collector's Station—which is many miles from where the property was sold, led to a paucity of bidders at the auction and occasioned a fall in the price would hardly be a reasonable inference, if it can be called an inference. And as to the inadequacy in the price, it is not such as to be insusceptible of other explanations, such as, that it was due to an apprehension on the part of the bidders that the purchaser will probably be involved in litigation about the validity of the sale, an apprehension which suits like this unfortunately tend to foster.

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I concur, therefore, in dismissing the appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Davies.

Valiappu Nayar and others ... Appellants* (*Plaintiffs* 2 to 5)

v.

Paru Nethiar and others ... ... Respondents (*Defendants*).

Valiappu Nayar *v.* Paru Nethiar.

Civil Procedure Code, S. 13—Issue *res judicata*—Estoppel by conduct—Indian Limita-Act, Art. 118—Affiliation of females—Possession by a Tarwad member—Adverse possession—Affiliation to branch of Tarwad—Local usage.

A suit for a mere declaration of title in so far as it relates to lands not in the possession of the plaintiff is unsustainable.

Where an issue had been decided in a previous suit between the same parties in reference to a portion of the subject-matter of this suit:—

Held, that the issue was not *res judicata* except as to the portion actually affected by the decision in that suit, as the tribunal which decided that case was not of jurisdiction compentent to try the subsequent suit.

Where the members of one branch were affiliated to and living with another branch of the Tarwad and had been recognised by the members of the whole Tawad as belonging to that branch:—

Held, that the members of the Tarwad were not estopped by their recognition from contending that the affiliated members had no right to the property of that branch, as the affiliated members had in no way acted to their detriment.

Art. 118 of the 2nd Schedule to the Limitation Act, relates only to the case of of the adoption of a son under the Hindu Law, but does not apply to affiliation of females under the Malabar Law or according to local usage as in the case of dancing-girls.

Where the Karavan is in possession of property on behalf a thavali, the constructive possession which every member may be said to have of the properties cannot support a claim by adverse possession.

There may be valid affiliations to a Tarwad; but an affiliation to a branch of a Tarwad not wholly severed from it cannot be made unless there is any local usage to support it.

Appeal from the decree of the Subordinate Judge's Court of Palghaut in O. S. No. 6 of 1897.

The facts appear from the judgment.

V. Bhashyam Aiyangar and *K. P. Govinda Menon* for appellants.

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* A. No. 151 of 1898. 28th February 1885.

C. R. Pattabhirma Aiyar for 1st respondent.

C. Sankaran Nair, Ryru Nambiar and *V. Raman Nair* for 1st to 3rd respondents.

The Court delivered the following

JUDGMENT:—This is a suit by the plaintiffs as members of Kallampattil Tarwad in respect of certain properties, held by a thavali or branch called Makkalvidu, which formed part of the undivided Tarwad, on the ground that the thavali had become extinct on the death of Pangunni Nayar who died in 1894. The 1st defendant and children, the 2nd and 3rd defendants, deny that the thavali is extinct, in that they are members thereof being descendants of one Nama Nethiar who, they allege, was in 1844, 1845, affiliated to the thavali by the members of whom it then consisted. The Subordinate Judge dismissed the suit.

That Nama Nethiar who was born in another thavali of the Kallampattil Tarwad was, about the time alleged by the contesting defendants, taken into the Makkalvidu thavali and that ever since she and her descendants have been looked upon and treated as members of that thavali, there can be no doubt. Whether Nama Nethiar thereby acquired in point of law the rights of a member of the thavali is the important question for determination. Other questions also are raised which it will be convenient to dispose of first.

The suit so far as it seeks merely a declaratory decree must fail as regards items in Schedule A. For we find that the plaintiffs were not in possession of the said items when they brought the suit; but the contesting defendants have, since the death of Pangunni referred to above, held possession thereof. We are unable to agree in the suggestion that no rents were collected by the contesting defendants prior to the institution of this suit. The evidence points clearly to the view that the tenants had attorned and paid rents to them even before the suit. The plea of *res judicata* raised by the contesting defendants cannot except as regards items 34 to 63 in Schedule A prevail, the former judgments relied on being those of Courts which were not competent to try the present suit.

With reference to the said items 34 to 63, however, the plea must be sustained, as in O. S. No. 12 of 1895 the 1st defendant

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recovered the lands as against the tenants then in possession and the present plaintiffs. As regards the question of estoppel by conduct upon which the decision of the Subordinate Judge dismissing the suit appears to have been principally based, we are unable to agree with him. There can be no doubt, as has been already stated, that Nama Nethiar and her descendants were long treated as members of the thavali by the members of the thavali as well as by the members of the whole Tarwad. But there is nothing to show that any right or interest vested in Nama Nethiar was abandoned in consequence of what took place in 1844 and 1845 or was thereby in any way affected. The only change that took place with reference to her and her descendants was a change of residence. Instead of living in one house and with one set of members of the family they lived in another house and with another set of members. It does not seem to us possible to hold that this alone amounted to such acting on the part of Nama Nethiar and her descendants to their deteriment or to such a change in their position as within the meaning of the doctrine of estoppel, will preclude the plaintiffs from contending that Nama Nethiar and the contesting defendants acquired no legal rights in respect of the Makkalvidu thavali property. The next question is whether the plaintiff's claim is barred by limitation. Article 118 of the Limitation Act was relied on, on behalf of the contesting defendants. The language of that article might at first sight seem to refer to any adoption. But in construing that article, it is necessary to read it with the next which is in *pari materia.* Reading the two together, it will be evident, having regard to column 3 of Art. 119 that they alike relate to the adoption of a *son* according to the ordinary Hindu Law, but do not extend to the affiliations of *females* as under the Malabar Law or according to the usage of women of the dancing-girl caste in some parts of the country. This view receives some confirmation from the corresponding provision of the law as it stood before the present Act was passed. The two classes of cases separately provided for by articles 118 and 119 of Act XV of 1877, had in Act IX of 1871 been dealt with in one and the same article, *viz.,* 129, the starting point of limitation being the same for both the classes of cases. As, however, when the present Act XV of 1877 was passed, the Legislature wanted the limitation to run in the case of one class—that of persons attacking an alleged adoption—from the time when those persons

became aware of such adoption, and in the other case that of persons seeking to establish the adoption from the time when these rights under the adoption are interfered with, it became necessary to make and introduce two articles in regard to the matter instead of one article as in the Act of 1871. There is, however, no ground for supposing that the Legislature intended to make a further change and to include in one only of these two articles, *viz.*, 118, affiliations of females not covered by the corresponding provision of Act IX of 1871 and which are manifestly not covered by the other intimately connected article. In this view it is unnecessary to consider the other objection raised on the authority of *Bhagatram* v. *Tulsi Ram*, cited in Mitra on Limitation (3rd Edition, p. 763), as to the applicability of Art. 118 to a case like this. Article 118 not being applicable, the only other article which can apply to the case is article 144. But under it the suit is clearly in time.

The next contention on behalf of the contesting defendants was that they had acquired a title by prescription as against the admitted deceased members of the Makkalvidu thavali and the plaintiffs who claim as heirs to such members are not entitled to eject the defendants. We cannot accede to this contention. Now there is nothing to show that Nama Nethiar or the contesting defendants held actual possession of any of the items in dispute exclusively or jointly with others, the actual possession having always been with the Karnavan of the thavali. And since so far as the separate property belonging to a thavali such as the Makkalvidu thavali is concerned, the right of the members of the thavali to such property is analogous to the right of the members of a Tarwad to the property of the Tarwad (compare *Kaleloola Sahib* v. *Nuseerudeen Sahib*, I. L. R., 16 M., 201) it follows that the right to actual possession of the thavali property was vested in the Karnavan of the thavali; while the right to constructive possession resided in the thavali as—to use the words of *Holloway* and *Innes*, JJ., in Regular Appeal No. 120 of 1870 with reference to a Tarwad—"an indissoluable unit"—a mere aggregate with no separate rights. Clearly the theory that the possession of the Karnavan of the thavali was the possession of the thavali as a whole cannot be made the foundation of a further fiction to the effect that each individual member of the thavali had as against every other member any possession capable of creating prescriptive rights *inter se*.

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It was next suggested that in the circumstances of this case a family arrangement entitling the contesting defendants to the property in question should be inferred. But no such arrangement was set up in the Court below. And we find no warrant in the evidence for upholing this suggestion.

The remaining question is whether Nama Nethiar was validly affiliated to the thavali. So far as we are aware the only affiliation recognized by the law to which the parties are subject is an affiliation to a Tarwad itself made under circumstances warranting such affiliation. No authority was brought to our notice in support of the validity of an affiliation to a thavali which has not become completely separated from the rest of the Tarwad, but remains united therewith. The affiliation relied on by the contesting defendants cannot, therefore, be held to have conferred on Nama Nethiar and her descendants any rights to the property of the thavali, unless the affiliation can be supported on the ground of special usage. Though no such usage was set up by the contesting defendants, we think it advisable, before disposing of this point finally to call upon the Subordinate Judge for a finding upon the question whether the affiliation of Nama Nethiar is valid according to usage, if any usage prevails in regard to such an affiliation. Fresh evidence may be taken, and in addition to the evidence which the parties may adduce, the Subordinate Judge may call for such evidence, oral and documentary, as might be available from other sources.

The finding should be submitted within two months from the date of the receipt of this order, and seven days will be allowed for filing objections after the finding has been posted upon this Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Moore.

Ramanna Balkuraya ... ... Appellant* (*Defendant*)

v.

Sankamma ... . Respondent (*Plaintiff*).

Ramanna Balkuraya *v.* Sankamma.

Penalty—Liquidated damages—Promise to pay additional rent on specified contingencies.

In a deed of lease, the lessee undertook to pay the revenue due to Government, the interest due on a mortgage executed by the lessor and 40 mudies of rice as rent to the lessor; and it was provided that if the lessee failed to pay any of these items in time, he should pay an additional rent of 5 mudies to the lessor. In an action by the lessor for the recovery of rent at the enhanced rate on the ground that the lessee failed to pay in proper time either the rent due to the lessor or the interest due to the mortgagee:—

Held, that the agreement to pay additional rent was not a penalty but liquidated damages and that the lessor was entitled to recover. *Wallis* v. *Smith*, 21 Ch. D., 243, referred to, and *Lord Elphinstone* v. *Monkland Iron and Coal Company*, 11 A. C., 332, followed.

Second appeal from the decree of the District Court of South Canara in A. S. No. 270 of 1897, modifying the decree of the District Munsif of Puttur in O. S. No. 209 of 1896.

The necessary facts appear from the judgment.

K. Srinivasa Aiyangar for *P. R. Sundara Aiyar* for appellant.

K. P. Madhva Rau for respondent.

The Court delivered the following

JUDGMENT:—*Subrahmania Aiyar*, J.—The sole question for determination in this case is whether, as contended for the appellant the provision contained in the instrument of lease, Ex. A, whereby the lessee is made liable to deliver to the lessor 5 mudies of rice, as additional rent if the lessee should fail to pay in proper time the sum of Rs. 24-8-3 payable to Government as revenue, &c., in respect of the land demised, or to pay on the due date the sum of Rs. 62-8-0 which the lessee was under an earlier provision bound to pay every year to one of the lessor's creditors as interest on the

* S. A. No. 1457 of 1898. 11th April 1899.

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amount due to him under a mortgage held by him on the land or to deliver at the time fixed 40 mudis of rice deliverable to the lessor as net rent, is a penalty.

Now the obligations upon the non-performance of any one of which the additional quantity of rice is, according to the above covenant, deliverable to the lessor differ in their importance with reference to the possible consequences of their non-performance.

The lessee's failure to deliver at the proper time the 40 mudis of rice deliverable to the lessor would not ordinarily cause much harm to the latter. But if default is made in regard to the payment of the Government revenue or the interest due to the mortgagee the lessor might suffer serious injury by the land being caused to be sold on account of such dues. The present case falls therefore under the third head of classification adopted by *Jessel,* M. R., in *Wallis* v. *Smith,* 21 Ch. D., 243, with reference to the question of the distinction between penalties and liquidated damages. And, as pointed out by the Master of Rolls at p. 258 of the report, the decided cases are uniformly in favor of holding in that class of cases that the parties intend the payment to be by way of liquidated damages. Among the decisions which specially deal with the question whether a promise to pay additional rent as in the present instance, is to be regarded as a penalty or as a promise to pay liquidated damages, it is enough to cite the decision of the House of Lords in *Lord Elphinstone* v. *Monkland Iron and Coal Company,* 11 A. C., 332, where the earlier cases are noticed, as an authority clearly supporting the latter view.

The lower Courts were, therefore, right in rejecting the appellant's contention and holding that as the appellant had committed default not only in regard to the delivery of the 40 mudis due to plaintiff but also in regard to the payment of interest due to the mortgagee, the plaintiff is entitled to recover the additional rent as liquidated damages.

The second appeal fails and must be dismissed with costs.

Moore, J.—I concur.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Subramania Aiyar and Mr. Justice Moore.

Anantanarayana Aiyar ... ... Appellant * (*Defendant*)

v.

Kuttalam Pillai and others ... *Respondents* (*Plaintiffs* 1 and 2 and *Supplemental Respondents*).

Anantanarayana Aiyar *v.* Kuttalam Pillai.

Temple committee—Resolution—Quorum—Unanimity.

Held, that the resolution of a temple committee constituted under Act XX of 1863 need not, in order to be valid, be the unanimous resolution of all the members of the committee.

Where three out of seven members attended a meeting convened after due notice to all the members and concurred in dismissing the plaintiff from temple trusteeship :—

Held, that a resolution passed by a majority of the members present at a *meeting* was valid and binding; that even if it was not law, yet in this particular case three formed the quorum under the resolution passed by the committee on the 19th of March, 1879, and subsequently uniformly acted on and that, therefore, the resolution passed by three members was not invalid in law.

Appeals against the decree of the Subordinate Judge's Court of Tinnevelly in O. S. No. 48 of 1895.

The facts appear from the judgment of *Subrahmania Aiyar*, J.

P. R. Sundara Aiyar and *K. Ramachandraiyar* for appellant.

V. Bhashyam Aiyangar and *M. R. Ramakrishna Aiyar* for respondent.

The Court delivered the following

JUDGMENTS :—*Subrahmania Aiyar*, J.—The appellant in this case was a trustee of the temple of Narambunadhaswami at Tiruppudaimaruthur, subject to the superintendence and control of a committee constituted under the Religious Endowments Act (XX of 1863). He was removed from the office under a resolution, dated the 24th October 1895, and passed at a meeting of the committee, which was convened after due notice to all the members, and at which three of them attended and concurred in his removal, the total numbers constituting the committee being seven. The

* A. No. 272 of 1897. 3rd May 1899.

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Subordinate Judge upheld the dismissal. There is no doubt that the dismissal is right so far as the merits go. Admittedly, the appellant sent no accounts to the committee from October, 1892. The plea set up by him that a great portion of the accounts was stolen from the temple is obviously unreliable.

This breach alone of one of the most important duties cast upon him by the law would have justified his dismissal. Several other grounds also in support of the dismissal have been established by the evidence.

It was, however, contended on the appellant's behalf that the resolution sanctioning the dismissal was invalid in law. First, because unanimity on the part of all the members of the committee was necessary for a valid resolution; and, secondly, if unanimity was unnecessary, then because the members who passed the resolution did not constitute a majority of the committee.

It is, however, difficult to believe that the learned vakil for the appellant was serious in contending that in the case of a body, such as the committee, in question, unanimity was necessary, since it is elementary law that in the case of persons called upon to exercise powers and functions of a more or less public character, unanimity is dispensed with for the obvious reason that if it were insisted upon, the power of willing and acting on the part of such persons would become impossible.

As to the second part of the contention, *Virasami* v. *Subba* (I.L.R., 6 M., at p. 57) is a direct authority against the appellant. As, however, the question was not discussed there, as the learned vakil strongly urged that the view taken in that case with reference to the present point is opposed to the established legal principle applicable to the matter, and as the point is one of some importance in connection with the working of committees under the Act, it is perhaps desirable to discuss it though briefly. In the Act, just referred to, there are no provisions bearing on the present question. Though committees constituted under the Act are not strictly corporations, there can be no doubt that, with reference to the matter in hand, such committees ought to be looked upon in the light of, and governed by the rules applicable to, regular corporations, as appears from, among other cases, *Grindley* v. *Barker*, where

Eyre, C. J., and *Buller*, J., expressly refer to the existence of such an analogy between corporations and persons exercising powers of a public character (1 Bos. and Pul. at pp. 237 and 239).

Now, as to the rules relating to corporations with reference to the present point, the law is stated thus in Kents' Commentaries:— "The same principle prevails in these incorporated societies as in the community at large, that the acts of the majority, in cases within the charter powers, bind the whole. The majority here means the major part of those who are present at a regular, corporate, meeting. There is a distinction taken between a corporate act to be done by a select and definite body, as by a Board of Directors, and one to be performed by the constituent members. In the latter case, a majority of those who appear may act; but in the former, a majority of the definite body must be present, and then a majority of the *quorum* may decide. This is the general rule on the subject; and if any corporation has a different modification of the expression of the binding will of the corporation, it arises from the special provisions of the act or charter of incorporation." (Vol. II., 13th Edition, pp. 292 and 293).

It is superfluous to say that this statement of the law is amply supported by the authorities cited by the learned author, many of which are decisions of English Courts. As to the distinction, however, between the case of a select body as a Board of Directors and the case of constituent members, noticed by the learned author, it is to be observed that such a distinction does not appear to have been recognized by the Civil Law as will be seen from the following passage from Mackeldey's work on that law: "If not otherwise prescribed this (*i.e.*, the coporate will is expressed by a resolution of the corporation. But if the constitution has no provisions on the matter, then all the members who have a vote must be convened, and whatever is then determined by a majority of the voters is to be regarded as the united will of the corporation, to which dissenters and absentees must submit." (Translation by Dropsie at p. 139). Nor does Savigny recognize any such distinction in that part of his system of Modern Roman Law where he deals exhaustively with the topic of juristical persons and cognate matters inclusive of the subject of majority, and where he points out the error of the notion (which notion is alluded to in the Subordinate Judge's judgment)

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that under the Civil Law it was necessary in the case of corporations generally, that a majority of two-thirds of all the members should be present whenever a resolution of a corporation had to be determined by a majority (See particularly p. 244 & note 250 and 251 and note—Rattigan's translation of Book II). The distinction in question would seem, therefore, to be more a peculiarity of the English Law than a principle of general jurisprudence. Assuming, however, that it is otherwise, let us consider the validity of the resolution in question on the footing that the law applicable is as stated in the passage quoted from Kent. Now, if a committee under Act XX of 1863 is in the position of the constituent members within the meaning of the passage, the conclusion to be arrived at is simple and clear. The meeting at which the resolution was passed, having, as already stated, been convened after due notice to all the members, and the members that attended the meeting having been of one mind, their resolution must in law be undoubtedly regarded as the resolution of the whole body. But suppose such a committee is to be viewed in the light of a select body, as a Board of Directors. As only three members were present at the meeting and as that number was less than a majority of the total number of members constituting the committee, the meeting and the proceedings thereof must be held to be invalid, unless the contrary conclusion is sustainable with reference to the resolution of the 19th of March 1879 (Exhibit B) and to the practice introduced thereby as to *quorum*. This resolution was passed at a meeting at which five out of the seven members were present; and it was then settled unanimously that three members should form the *quorum*. The evidence abundantly shows that this resolution has ever since been acted upon. That the committee, as a body resembling a corporation, possesses, as urged for the respondent, in the absence of any provision on the subject in the Act XX of 1863, implied power to make rules or bye-laws with reference to the matters dealt with in the resolution of the 19th March 1879 was not disputed and cannot be disputed (Lumley on Bye-laws, pp. 7—11). This resolution, until it is revoked or altered, must be taken to be a valid bye-law and binding upon all the parties concerned provided it does not contravene the law of the land in any respect and provided it is not unreasonable. No doubt if the rule, requiring the presence of a majority of all the members of a select body at a meeting of such a body were an

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inflexible rule, the resolution of the 19th. March 1879 cannot be treated as a good bye-law. But that that rule is not inflexible is shown by *In re Tavistock Ironworks Company. Lyster's Case*, L. R. 4 Eq. 233, Lord *Romilly*, M. R., there held that as the articles of association of the company, concerned in that case, were slient on the point, and as the business of the company had been usally conducted by any two out of a Board of six Directors, two Directors did form a *quorum*. The circumstance that there the practice of two conducting business was tacitly adopted, while here the practice of three meumbers doing business was introduced by an express resolution is, of course, immaterial. The difference, if any, between the two cases, is only such as to make the present a stronger case than the other. As to unreasonableness, there is no ground whatever for saying that the resolution is open to such on objection.

It follows that the resolution of the 19th March, 1897, and the practice inaugurated by it, are valid, and that the three members who attended the meeting on the 24th October, 1895, were perfectly competent to pass the resolution removing the appellant. It is scarcely necessary to say that the present decision applies only to transaction of business by the members of a committee at a *meeting* which is the ordinary and natural mode of ascertaining the corporate will, securing, as it does, the advantages and safe-guards resulting from personal consultation. Should a committee transact business otherwise than at a meeting whether unanimity is not necessary to render such transaction of business valid (*In re Great Northern Salt and Chemical Works*, 44 Ch. Dn. at 480 and 481) does not arise in this case and need not be considered.

It remains to notice the cases cited for the appellant. First, as to *Cook* v. *Loveland* (2 Bos. and Pul. 31). The master and one warden, whose action was there in question, had clearly no authority to act as deputies of the whole body as they were not appointed as deputies. With reference to their positions as among the principals no question of *quorum* at a meeting such as is raised here was or had to be decided there. *Brown* v. *Andrew* (18 L. J. Q. B. 153), cited next, was a case in which the relation of principal and agent, in the strict sense of the terms, undoubtedly existed. The authority given was treated as a special joint authority given to a fixed number of persons who were bound to join. It is, however, noteworthy that

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

On Appeal from the High Court of Judicature at Madras.

Present:—Lord Watson, Lord Hobhouse, Lord Davey, Sir Richard Couch.

Annapurni Nachiar ... ... Appellant *

versus

Forbes and another ... ... Respondents.

Annapurni Nachiar v. Forbes

Hindu Law—Adoption—Several wives—Association of one in the act of adoption—Death of adopted son—Relative rights of the mothers.

It is competent to a person to associate any one of his several wives in the act of adoption. Thereupon that wife becomes the mother of the adopted boy and is entitled to succeed to him on his death in preference to the others who stand to him in the relation of step-mothers only.

The facts appear from the argument.

Mr. Mayne for appellant.

Mr. Jardine, Q.C., and *Mr. Branson* for respondent.

Mr. Mayne.—The point your Lordships have to decide is a pure and simple point of law which has never come before your Lordships for decision, and I do not think it has come before any Court of India in any way in which the whole thing has been solemnly argued out, before the present case.

The question arose in this way. There was a Zemindar of Uthumalai, who died leaving an adopted son and two widows. The Court of Wards took possession on account of the adopted son, who was then a minor. Then the adopted son dies, still being a minor. The estate is an impartible one to which therefore only one of the widows could succeed. The Court of Wards offers to give it up to either of the two widows provided they can agree between themselves as to which of them is entitled. Naturally they did not agree among themselves, and the suit resolves itself practically into an interpleader suit between the two widows. Each of them accumulates the greatest possible doubt upon the head of the other, and makes all sorts of assertions of fact which ultimately become embodied in various issues, and the fruit of which is displayed in this enormous record. Ultimately this issue of law emerges. One widow whom I represent, the appellant, is entitled to be considered the senior widow, and as such, *primâ facie* succeeds to an impartible estate, but both of the widows can only claim as mothers of the adopted son who died, because the title must be traced from him, and each of

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them claims as mother of the adopted son. If they were equally entitled, if their claim as mother of the adopted son was equal in other respects, then the seniority of my client would carry the day, and she would be entitled to be the next Zemindar. But then emerges the other fact that when the adoption was made, the Zemindar being on bad terms with my client, chose in making the adoption to do what is called "associate himself with the wife who is my learned friend's client. He made the adoption as they say in conjunction with her; and it is asserted that by virtue of her being associated with his act of adoption she becomes the sole adoptive mother, and that the other widow who is not present at the adoption is not an adoptive mother at all.

Then a good deal of argument arises from the philological circumstance that the Sanscrit word, whether applied to a male or a female, which occurring in the Sanscrit Law Books is translated into English as being "adoptive," is a word which means the person who receives the boy in question: and it is asserted that in this case Mr. Jardine's client is the only widow who can satisfy the words "who received" the boy in question.

Well, my Lords, that is the state of things, and ultimately your Lordships will practically have to decide whether a widow, by virtue of her having been as a physical fact associated with the husband in the ceremonial of adoption thereby brings herself into a different category of Hindu law, and occupies a different relation in respect to the boy who is ultimately adopted, from any other lady who, being equally the wife at the time, does not happen to be present at the ceremony. That is the whole question.

Lord Hobhouse.—There is no doubt the boy became the owner?

Mr. Mayne.—There is no doubt of that.

Lord Hobhouse.—And he is the root of the title?

Mr. Mayne.—He is the root of the title. Neither of these widows has any title except as the mother of the boy.

Now, my Lords, in arguing this case I wish to clear away as much as possible all that might be disputable, and, although not in the slightest degree making any admission on the subject, it is not necessary for my case to argue that there might not be a difference if the adoption instead of being made by the husband during his lifetime with or without the presence of one or more of his widows, had been made after his death by a widow who is especially authorized by him to make the adoption, and who did make the adoption as his delegate and represen-

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tative, he being dead, and who had received, herself, at the ceremonial, the boy, by virtue of, the authority given to her to receive him, an authority which could not be acted upon by any other widow—that she by virtue of that authority had herself performed the ceremonial, and received the boy as his representative and under his authority. I do not in the slightest degree admit that that would make any difference, but I say it is not necessary for me in this case to argue that it might not make a difference, because in this case what has happened is that the adoption was made by the husband himself, and that the widow, whether present or not present, was not the person undoubtedly who made the adoption.

Now, my Lords, the position that I put forward to your Lordships in such a case is this. In the first place it is admitted, and my learned friends will not dispute that when the husband is alive the act of making the adoption is entirely one which depends upon his own volition and upon his own act. It is not necessary, to ask the consent of his wife. Her consent is not necessary, and her dissent would be absolutely immaterial. That is one assertion.

Lord Watson.—The adoption, to be valid, must have consent.

Mr. Mayne.—It is the husband who makes the consent.

Lord Watson.—It is the husband who adopts?

Mr. Mayne.—Yes.

Lord Watson.—The adoption is made of a son to him. The boy stands *in loco* of a son.

Mr. Mayne.—It is made of a son to him, and when by that fiction he becomes the son, then as far as physiological facts will admit of it, all the consequences follow to that son that would follow to the naturally born son. The final decision upon that point was given by your Lordships in the case in 10 Indian Appeals, page 138, where the question which had been long subject to conflicting decisions as to whether the adopted son would inherit to the private and personal property of the wife of the adopting father was raised and finally settled by your Lordships. And it was settled that as he would succeed to all the property of the adopting father, so he would succeed to the property of the mother—the person who became a mother by adoption; and he would succeed to her property and she would succeed to his.

Lord Davey.—*Primâ facie* do all wives of the adopting father become mothers of the adopted son?

Mr. Mayne.—That is the point.

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Lord Davey.—A boy might have many mothers.

Mr. Mayne.—He might have a dozen mothers: that is the difficulty. That is the way the question will arise.

Now first of all I say your Lordships will see the question here is whether by virtue of a particular act she acquires the separate position. In the first place having shown, and it not being disputed that her consent, her existence is a mere cipher in the matter up to the time of the adoption: my next point is, that the ceremonial not only does not require her presence, but does not leave any ground for her presence. She might of course be present just as the father and mother of a lady who is being married are present, and the father or mother or the brother may give the lady away in marriage, but that is an ornamental presence. It adds nothing to the efficacy of the ceremony, and the absence of the fact will take nothing away from it.

Lord Watson.—Is there anything in the ceremony of adoption itself which suggests that the son adopted by the father is the adopted son of a particular mother?

Mr. Mayne.—Nothing at all. I will show your Lordships what the ceremony of adoption is. Max Müller's Sacred Books of the East, Volume 14, contains Vasishtha and Baudhayana Vasishta which your Lordships will find at page 75 is very short indeed. First come the words—the fourth clause, which your Lordships had so anxiously to consider in the adoption case about the only son. Then follows: "Let a woman neither give nor receive a son except with her husband's permission." Then there is the ceremonial which is a very short one. "He who desires to adopt a son, shall assemble his kinsmen, announce "his intention to the king, make burnt offerings in the middle of the "house, reciting the Vyahritis, and take (as a son) a not remote "kinsman, just the nearest among his relatives."

Now Baudhayana, whom your Lordships will find at page 334 of the same volume, gives a more extensive ceremonial. He is one of the very earliest of these sages. At paragraph 7, page 334, he says: "He "who is desirous of adopting (a son) procures two garments, two "ear-rings, and a finger ring; a spiritual guide who has studied the "whole Veda; a layer of Kusa grass and fuel of Palasa wood and so "forth. (8) Then he convenes his relations, informs the king (of his "intention to adopt) in (their) presence, feeds the (invited) Brahmanas "in the assembly or in (his) dwelling, and makes them wish him 'an "auspicious day,' 'hail,' (and) 'prosperity'. (9) Then he performs "the ceremonies which begin with the drawing of the lines on the altar

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"and end with the placing of the water vessels, goes to the giver (of "the child) and should address (this) request (to him) 'give me (thy) "son.' (10) The other answers, 'I give (him).' (11) He receives "(the child with these words) 'I take thee for the fulfilment of (my) "religious duties; I take thee to continue the line (of my ancestors).' "(12) Then he adorns him with the (above-mentioned) two garments, "the two ear-rings, and the finger ring, performs the rights which "begin with the placing of the (pieces of wood called) paridhis (fences "round the altar) and end with the Agnimukha and offers (a portion) "of the cooked (food) in the fire. (13) Having recited the Puronu-"vakya (verse). 'He who is thinking of thee with a discerning mind, "&c., he offers an oblation, reciting the Yagya (verse), 'To which "performer of good deeds, thou, O Gatavedas,' &c. (14) Then he "offers (oblations, reciting) the Vyahritis: (the ceremonies) which "begin the oblation to Agni Svishtakrit and end with the presentation "of a cow as a fee (to the officiating priest are) known. (15) And "presents (to the spiritual guide) as a sacrificial fee those two dresses, "those two earrings, and that finger ring (with which he had adorned "the child). (16) If after the performance of these (rites) a legitimate "son of his own body is born (to the adopter, then the adopted son) "receives a fourth (of the legitimate son's) share."

Your Lordships see that the whole of the ceremonial is performed by the father. There is nothing in that ceremonial to suggest that the wife need be present, or if present, has anything rightly to do with it. The giving is by the father if there is one, or by the mother if the father is dead, of the son who is to be given in adoption. No one else can give. The receiving is by the father if he is present and alive, and no one else can receive. Your Lordships have decided in a case in the 7th Indian Appeals, page 250, that in the case of Sudras, as these people are, nothing else is essential to the ceremony except the giving and receiving. Among Brahmins it is a question of whether some particular fire ceremony is not essential, but among Sudras, as these people are, nothing is essential but the giving and receiving. As soon as the giving and receiving are over, the child becomes irrevocably adopted. So that I say again nothing depends upon the ceremonial. The wife has no part in the ceremonial and if she takes any part in the ceremonial that part is absolutely inoperative. There is nothing she can do which is part of the receiving of the child. She may receive the child as much as she likes, but it is the receiving by the father that constitutes the adoption. Anything that she does is unnecessary; anything that she does, does not affect the ceremonial of the adoption.

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Lord Hobhouse.—You mean there is nothing necessary but the gift by the natural father, and the reception by the adoptive father?

Mr. Mayne.—Yes: That every legal consequence which follows from the adoption, follows from that and from nothing else.

Now the next point is that it is the mere fact of the adoption which makes the wife the mother of the adopted son. That is shown in the Dattaka Mimansa, Section I, Clause 22. He is arguing the question as to whether any sanction by the wife is necessary, and he settles that in the way that it is admittedly settled now, at Clause 22. "If the case is thus, then the assent of the wife is requisite for the "husband also; for the purpose (of such sanction) would be the same; "(as that of the husband to the adoption by the wife). This (if "alleged) is wrong; for in consequence of the superiority of the "husband, by his mere act of adoption, the filiation of the adopted, as "son of the wife, is complete in the same manner as her property, in "any other thing accepted by the husband." He gets rid of the objection which had been urged by some persons that the consent of the wife was necessary, and he says: "No, in consequence of the "superiority of the husband, by his mere act of adoption the filiation "of the adopted, as son of the wife, is complete." So that it is not anything that she can do, in the way of receiving the child at the ceremonial, that makes the child her son and makes her the child's mother. It is an end of the discussion as to the necessity of the wife's consent, and he settles that in that way.

Sir Richard Couch.—This is laid down by Nanda Pandita.

Mr. Mayne.—Yes.

Sir Richard Couch.—It is not taken from any earlier sage.

Mr. Mayne.—No, no earlier sage mentions anything with regard to the necessity of the wife giving a consent to the adoption by the husband.

Sir Richard Couch.—In fact there is no earlier authority.

Mr. Mayne.—There is no earlier authority. This authority has been admitted and that branch of the law is settled upon the authority of Nanda Pandita.

Sir Richard Couch.—There is some case referred to in, I think, 8 Indian Appeals.

Mr. Mayne.—The case in 10 Indian Appeals is the one that settles the right of succession.

Sir Richard Couch.—In the Judgment I gave in the 10th Indian Appeals I referred to some previous case in 8th Indian Appeals, page 229.

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Mr. Mayne.—That I have not brought down.

Next from the mere fact of adoption the son has not only a right, but an obligation to present offerings to the adoptive mother. That is laid down in the Dattaka Mimansa, clause 6, paragraph 50. A discussion had previously gone on as to the position of a person who is the son of two fathers, who acquires a fresh paternity in one family without losing his paternity in the other.

Sir Richard Couch.—I see I delivered the Judgment in both the 8th and the 10th Indian Appeals.

Mr. Mayne.—May I ask what did the 8th Indian Appeals decide ?

Sir Richard Couch.—The same thing is decided in the 8th as in the 10th.

Mr. Mayne.—At paragragh 49 of the Dattaka Mimansa, Section 6; he is talking of the effect of adoption upon the obligation to perform particular ceremonies, in a particular family, and he says; "The "çákhá or peculiar branch of the Vedas is that of the adopter only. "Vasishtha declares so: 'Sprung from one following a different çákhá "(or branch of the Vedas) the given son even when invested with the "characteristic thread, under the family name of (the man) himself, "according to the form prescribed by his peculiar çákhá becomes "participant of the duties of such çákhá (Sva-çákhá-Bhàk). That "duty in which his peculiar, (that is the adopter's) çákhá prevails, is a "duty of such çákhá; in this he shares, or is 'participant,' &c. Such "rite only which is prescribed by the çákhá of the adopter must be "performed by him." And then he goes on at paragraph 50. "The "forefathers of the adoptive mother only are also the maternal "grandsires of sons given, and the rest, for the rule regarding the "paternal, is equally applicable to the maternal grandsires (of adopted "sons)."

Lord Davey.—That was held in that case in which Sir Richard Couch delivered Judgment.

Mr. Mayne.—In the 10th Indian Appeals. Then there is the Dattaka Chandrika, Section 3, Clause 17, which is to the same effect. He is talking again of the some thing as to how he ceases to perform the funeral rites in his natural family, and he performs them only in his adoptive family. He says: "But the absolutely adopted son "presents oblations to the father and the other ancestors of his adoptive "mother only; for he is capable of performing the funeral rites of that "mother only." In all cases your Lordships will see when they talk

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of the adoptive mother they are not contemplating several mothers. Manu lays down a rule Chapter 9, Section 183.

Sir Richard Couch.—That will not be disputed, will it? Need we trace it back to Manu. It is settled, is it not?

Mr. Mayne.—I should have thought it was: "Thus if, among "all the wives of the same husband, one brings forth a male child, "Manu has declared them all, by means of that son, to be mothers of "male issue."

Lord Hobhouse.—I think a deputation waited on him and asked him what Manu had revealed concerning the utterances of Brahma himself.

Mr. Mayne.—Yes, Manu seems to have said something to the ten sages; every one of them forgot it. Then they got Bhrigu to go and get his memory refreshed.

Lord Davey.—If there is a legitimate son by one wife, are all the wives mothers of that son?

Mr. Mayne.—Yes, that is what Manu says:—

Lord Davey.—Is that the modern Hindu doctrine?

Mr. Mayne.—Yes.

Lord Davey.—So that he stands in the relation of a son, or grandson, to the ancestors of all the wives?

Mr. Mayne.—Yes; but your Lordships will find with regard to inheritance he is in a different position with regard to his own actual mother and in regard to the others. But that is because both the Works, the Daya Bhaga and the Mitakshara, which declare that under particular circumstances the mother is the next in succession to the natural born son, hold that that word "mata" is limited to the natural mother.

Lord Davey.—For the purpose of succession a son of one wife would not succeed to another wife.

Mr. Mayne.—No. The stepson will succeed under certain circumstances to the step-mother, but the step-mother will not succeed as mother to the stepson.

Sir Richard Couch.—The step-mother will not succeed.

Mr. Mayne.—No, because in giving the succession of the mother he uses the word "mata" and that has been interpreted to be limited.

Lord Davey.—The converse is not true. So that the son of one wife might succeed as heir of the father of another wife.

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Mr. Mayne.—He might succeed. He could only succeed to the mother in regard to her private property, her self-acquired property. And in regard to her self-acquired property the stepson will succeed to his step-mother.

Lord Davey.—They are mothers for religious purposes.

Mr. Mayne.—Yes, but not for purposes of descent. The natural born son is bound to perform the ceremonies to everybody.

Now, my Lords, if therefore the natural born son is, for some purposes at all events, the son of all the wives, and if the adoptive son assumes, by virtue of his adoption, the same position as if he had been born, the natural inference is that he would be the son of all the wives. At all events we get as far as this. The question has never been contemplated by any of these sages, nor by any of the commentators who are of independent authority. The first discussion upon it, or indication that any difficulty might arise upon the matter is to be found in Jagannatha's Digest; in the 3rd Volume of the Digest, page 253. I am quoting the original edition of 1801, called Colebrooke's Digest. It is a long commentary upon Placitum 273.

Sir Richard Couch.—Here it is in section 8, paragraph 272, that is the two volume edition. "On the son given"; that seems to be the right reference.

Mr. Mayne.—Yes, section 8, chapter 4 and then I think it is divided again into books. Now the first writer that I know of who refers to this question of plurality of wives is Jagannatha, and he says at page 253 "If a son be adopted by a man married to two wives, he would have "two maternal grandfathers, and would claim as maternal ancestry "both their lines of forefathers. This seeming difficulty is thus recon- "ciled. Although there be two sets of maternal ancestors they should "be jointly considered as manes of ancestors and they should be thus "named in performing the sradd'ha 'such a one maternal grandfather, "sprung from such a primitive flock! such a one maternal grandfather, "sprung from such a primitive flock! To thee (to each of you) this "funeral cake is offered,' and so forth as is done by the son of two "fathers. Thus some reconcile the difficulty." Your Lordships will find it argued that he seems to think that some persons only reconcile and admit the fact that a son adopted by a man married to two wives would have two maternal grandfathers. But I submit that that is not so. What Jagannatha says is as a matter of fact, a son adopted by a man married to two wives would have two maternal grandfathers, and "the seeming difficulty is thus reconciled."

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Lord Hobhouse.—He makes offerings to each.

Mr. Mayne.—Yes, and the difficulty of making offerings to each is managed in this way. He recites the names of the different people, and then says to them, "to each of you these offerings are made." He says; some people reconcile the difficulty in this way; others reconcile the difficulty I suppose in other ways; but according to him he accepts it is matter of perfect certainty that when a man is adopted by a man married to two wives he will have two maternal grandfathers. Each of the wives is his mother and the father of each is his maternal grandfather.

Lord Hobhouse.—I suppose Jagannatha rests that on general reading, not on anything peculiar to the Daya Bhaga?

Mr. Mayne.—Just so.

Lord Hobhouse.—They are under the Mitakshara, in this case.

Mr. Mayne.—There is nothing peculiar in the Daya Bhaga so far as I know to the law of adoption.

Sir Richard Couch.—There is no difference between the Mitakshara law and the Daya Bhaga law in this matter.

Mr. Mayne.—None whatever, which of course makes Jagannatha's authority very high. Jagannatha no doubt was a man of immense learning.

The next place which I know of in which this question is noticed is in the 1st volume of Sir William Macnaghten's Hindu Law. In the preface, page 10, he says: "In all codes however there must be some "omissions which can only be supplied by analogy. From this defect the "Hindu Law cannot be expected to be altogether exempt. Where such "cases occur, they doubtless furnish ample proof for ingenuity; though "in the course of my experience, I have met with but few instances of "the kind, and still fewer in which there could be any legitimate or "reasonable ground to doubt as to which side of the argument the "preference should be assigned." Now he goes on with a matter which is material to this, and he says: "I will illustrate my meaning by "mentioning a case in point, in which, though there is more to be said "on both sides than in most others of a similar nature, there can be "but little doubt as to the doctrine which should be preferred. A man "dies childless, leaving three widows him surviving. He gives per-"mission to one of them to adopt a son after his death, which is done "accordingly." This is a stronger case than is necessary for me. "The adopted son dies, also childless, leaving the three widows afore-

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"said him surviving. Now the question is, to whom on the death of "such adopted son, will the property go? Should it be taken entirely "by the widow who made the adoption, or should it be divided equally "among the three widows? The law is silent as to this particular case; "and those who contend that the property should be taken by the single "widow, do so on the ground that although had there been no adoption, "the three widows would have been entitled to equal shares, and "although, had the childless husband adopted the boy during his life-"time, he could not have selected for him as adopting mother one of "his three wives, and excluded the others from all maternal relation, "yet that a boy having been adopted after the death of the husband, "to estate to which he succeeded belongs of right to the widow who "received him in adoption, to the exclusion of the other two, who can be "considered in the light of step-mothers only. This reason seems "plausible enough but it is not the law. The three widows of the same "man are held to be, in a legal point of view, one and the same indivi-"dual. The widow to whom the permission was given may indeed have "the privilege of selecting the boy to be adopted; but the adoption "being once made, he necessarily holds the same relation to all the "three widows of his adopting father. I here merely allude to the "rights and privileges accruing to the single widow from the simple "fact of her having made the adoption, independently of any intention "expressed or implied by the deceased, that such widow alone, should "be considered as the mother of the adopted child. If he declared this "explicitly, the case would be different; or if such may be reasonably "gathered to have been his intention, from some unequivocal indication "of his will that his other wives should have no concern with the adop-"tion. But the simple fact of his having commissioned any one of the "three to select the boy, cannot be considered as sufficient to deprive "the two others of their maternal rights, or to debar them from taking "the shares to which they would have succeeded had no adoption "taken place."

Lord Davey.—That seems to be right upon principle because the widow under a commission from her husband merely adopts as his agent.

Mr. Mayne.—Yes. Your Lordship sees it is a much stronger case than this, because in the case of adoption made by a man, the widow does not receive..

Lord Davey.—Then I suppose it would be said that he has given an unequivocal expression of his intention.

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Mr. Mayne.—He says it is not the mere fact that he authorized her to make the selection, it is not the mere fact that he authorized her to follow up that selection by adoption; it is not the mere fact that she as representing him receives the child in adoption that makes the difference. It must be some unequivocal act of his own which operates as creating a title in one, to the exclusion of all the others. And it is question of course whether a man could do that sort of thing. But the very people who argue that that might be done in the case of a widow adopting after the death of the husband, say they do so on the ground that although had there been no adoption the three widows would have been entitled to equal shares, and although had the childless husband adopted the boy during his lifetime, he could not have selected for him as adopting mother one of his three wives, and excluded the others from all maternal relation; yet that under certain circumstances it might be done if he selects a person to perform the adoption for him after his death. I must say I fail to see the distinction between the two cases. But there is this obvious distinction that in the case of adoption by a man himself, everything is done by himself. The wife has nothing to do with the selection, the adoption, or the ceremonial at the time of the adoption, and the man cannot by saying " Oh! you come in and be present at the adoption', or 'you come in and take the child in your lap after I have received him',—he cannot give her a right which would exclude the other widows. He cannot, by getting her to do something irrelevant and non-significant, put her in a position to the detriment of the other wives, which would not have taken place if it had not been done.

Lord Hobhouse.—Macnaghten does not refer to any authority, does he?

Mr. Mayne.—No.

Lord Hobhouse.—The whole of the law on the subject seems to be quite recent.

Mr. Mayne.—It is perfectly recent.

Sir Richard Couch.—This is Sir William Macnaghten's opinion.

Mr. Mayne.—Yes, and it is his opinion upon a matter that has evidently been discussed. I wish to call your Lordship's attention to the view that has been taken a very long time ago, in 1846, of the weight to be attributed to Sir William Macnaghten's opinion.

Lord Hobhouse.—He is a text writer of great authority.

Sir Richard Couch.—No one doubts the weight of his opinion.

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Mr. Mayne.—In a case which I have here their Lordships say "we are informed by the very learned Assessor Sir Edward Ryan, that this work is constantly referred to."

Sir Richard Couch.—I think that is quite familiar.

Mr. Mayne.—His opinion on a point as to which there is nothing to be found in the old writers is important.

Lord Hobhouse.—You talk of an insignificant act making no difference. I confess to the greatest difficulty when we get on these subjects in knowing what is and what is not insignificant. The whole thing is so very arbitrary.

Mr. Mayne.—No doubt. If I may say so I thoroughly agree with what your Lordship is suggesting.—It was a question which arose in that great adoption case. When you have a text which says a number of things are to be done—(take this very text that I read)—it is very difficult to see what is directory and what is mandatory.

Sir Richard Couch.—We have had that difficulty not long since.

Mr. Mayne.—That is a difficulty which constantly arises. But in this case they are putting into the Law something which has never been suggested by anyone, and they are saying that the presence of one widow in preference to another, her taking part in the ceremony, or it being made in conjunction with her, gives her a position which she would not have filled if that had not been done, and gives her a position over a person who has not been asked to do a thing, which when done is outside the circle of the law. Because the law says as long as a man adopts, it is he who adopts, and nobody else. If she takes the child in her lap before he takes it there is no adoption at all.

Lord Watson.—He cannot deprive his own wives of motherhood, in a certain sense to the adopted child. He cannot prevent that relation arising between them, because they are his wives.

Mr. Mayne.—Yes.

Lord Watson.—What seems to be held in this case by the Courts below is that a Zemindar adopting a child personally during his *life-time* may select one of the wives to receive the child in adoption—to be present at the ceremony and to receive the child.

Mr. Mayne.—He cannot appoint a wife to receive the child in the sense of receiving in adoption. He must receive, and nobody else.

Lord Watson.—He must take the child as his son.

Mr. Mayne.—He must receive the child.

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Lord Watson.—If he selects one particular wife to be present at the ceremony in which he receives the child, and by his desire the other wives are not so present and take no part in the ceremony, the learned Judges seem to have held that he thereby establishes between the adopted child and the wife who is selected to be present, the relation of mother to that child in a stricter sense than that relation which connects it with his other wives.

Mr. Mayne.—That is what I submit there is no authority for, and it is contrary to principle.

Sir Richard Couch.—Sir William Macnaghten says something about his intention.

Lord Watson.—It is suggested that this makes the child, the adopted child, the son of that mother, in this sense that she becomes the heir of the child in the event of his subsequent decease.

Mr. Mayne.—I submit that that is contrary to first principles. It is contrary to the principle laid down by the Dattaka Mimansa.

Sir Richard Couch.—That will be a matter for consideration.

Mr. Mayne.—Yes. I say it is contrary to that. Of course in Bengal a Zemindar may alienate his property.

Sir Richard Couch.—This is the passage in my mind. He says: "I "here merely allude to the rights and privileges accruing to the single "widow from the simple fact of her having made the adoption, inde-"pendently of any intention expressed or implied by the deceased, that "such widow alone should be considered as the mother of the adopted "child." The Court below seemed to think that what the Rajah did on this occasion show some intention on his part at the time of the adoption that this particular wife should be treated as the mother.

Lord Hobhouse.—I do not know what their reasoning is.

Mr. Mayne.—I want to put all the law before your Lordships before I read the Judgments. I think you will be able to appreciate the Judgments better.

The next passage that I refer your Lordships to is in the 2nd Volume of Sir William Macnaghten's Hindu Law, page 62. "After the "death of Rutunmala, first widow of Kishenkishore, and of Nundkishore "the son adopted by her, without issue, who was heir to the two anna "share left by them, was it the Appellant, Narainee Dibia, second widow "of Kishenkishore, or Ramkishore, the son adopted by her, if he be "really so, or the heirs of Kishengopal Rai, full brother of Kishenkishore, "or the heirs of Gunganarain and Lukhinarain, half-brothers of Kishen-

"kishore? And does the case turn at all on the legality or illegality of "the adoption of Ramkishore by the Appellant, Narainee Dibia?" Your Lordships will find this at page 62. "Zemindar of Pergunnah "Mymensingh, &c., left 4 sons, the first and second by one wife, the "third and fourth by another." Then the 4 sons are set out. "Kishen-"kishore Zemindar of 4 annas in dispute, died in 1171, without issue, "leaving two widows, *viz.*, (1) Rutunmala, who died in 1191 after "adopting Nundkishore, (2) Narainee Dibia (the plaintiff) who states "that she adopted Ramkishore after Nundkishore's death. Kishengopal "had no issue, but adopted Jogulkishore, the father of Hurkishore "(the defendant). Lukhinarain left two sons." The answer is "If "after the death of Rutunmala, first widow of Kishenkishore, her "adopted son Nundkishore, adopted under due authority from her hus-"band, died without issue, Nundkishore's two annas go to the adopted "son of Kishengopal, full brother of Kishenkishore, (that is, to the "cousin-german by adoption) not to the second widow of Kishen-"kishore (step-mother by adoption)." As to the other heirs we need not trouble ourselves. It goes on:—"The reason why the "step-mother of Nundkishore, that is, Narainee, the Appellant, "cannot succeed to his share is, that in the Daya Bhaga and "other authorities common in Bengal, wherever the word *mata*, "or mother, occurs, it is explained to intend janani, or actual mother. "These books do not authorize the step-mother's succession. But she "should receive a maintenance from the person who takes the inheri-"tance. In the books of the Dekhan, *viz.*, the Mitakshara, &c., the "word *mata* implies both mother and step-mother; according to these, the "step-mother would share." Now his ground is that, he says, she, by adopting a son became with her husband's consent (of course in Bengal she could not adopt without his definite consent) she becomes a full mother, and the other one is the step-mother. There is no authority for the statement that she then becomes a full mother in preference to the other, who becomes a step-mother. But he relies on the text of the Daya Bhaga, which says that if she was a mother who had given birth to this boy, instead of having adopted him, undoubtedly his own wife would be merely the boy's step-mother, and he would be under no obligation to perform her ceremonies; and, therefore, the inheritance would not go to the step-mother. But of course that assumes that the several wives of an adoptive father are in this curious position; if none of them are present at the ceremony, or occupy any particular position in the ceremony, then they are all undoubtedly full mothers, and the question of one being a step-mother, and the other being not a step-mother does not arise. But if the adoption is made after the death of

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the husband by a special authority given to her to adopt, then she takes up a different position from what she would have taken if the adoption had been made by him in his lifetime. That may be so or it may not be so.

Lord Watson.—If you take Macnaghten's law, not unless his intention in that event be explicit. Suppose he made a declaration, at the same time importing into it the condition that she should become the nearest mother.

Mr. Mayne.—That is talking of an adoption after his death. Sir William Macnaghten expressly excludes the possibility that he can do that.

Lord Watson.—Of making his intention valid after his death?

Mr. Mayne.—Yes.

Lord Hobhouse.—He does not mention who the people are whose opinions he is combating.

Mr. Mayne.—No.

Lord Hobhouse.—They might not accept that account of their opinions.

Lord Watson.—It does not seem very strictly logical. The question is whether he is right in stating the law.

Mr. Mayne.—I submit that his opinion upon this point is evidently in accordance with Jagannatha's opinion. Jagannatha by the fact of adoption evidently treats each of them becoming mothers with the same efficacy. The Futwah in the second volume, page 62, merely comes to this: if there had been the adoption made by a widow under the authority of her husband, she becomes the real mother; and the others become merely step-mothers. They are mothers, but they are step-mothers. Then he says only the mother can succeed, and not the step-mother. But that principle that only the mother can succeed, and not the step-mother, arises from a special application of the word "mata" which applies to actual mothers, to a case where there is an actual mother who has produced the child, in conflict with other mothers, who have nothing to do with the production; whereas in the case of adoption, according to the Dattaka Mimansa, at the moment of adoption as the relation of paternity is created in the father, the relation of maternity is created in all the mothers.

Lord Hobhouse.—Have we not had cases where the question is whether a woman, taking the case of a widow, has adopted to herself as well as to her husband?

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Mr. Mayne.—In this case the question is, has she adopted to her husband. If she adopts to her husband all the consequences following from the law of adoption arise. If she adopts to herself only, that adoption is invalid. It is not an adoption at all unless it is a kritrima adoption. A kritrima adoption admits of an adoption by a widow to her own property. The ordinary law of property does not recognise anything of the sort.

Lord Watson.—She cannot adopt a son to herself so as to constitute any relationship, by all the laws of adoption?

Mr. Mayne.—Except under the kritrima law she can create no relationship of son and mother between herself and any given boy, unless she has commenced by making him the son of her husband. If she makes him the son of her husband he becomes *ipso facto* her son. If she does not create him the son of her husband she cannot make him her son. She may adopt him in the sense that you or I may adopt a son. It does not constitute a relation of maternity.

Lord Watson.—The mother is by necessity a member of a Hindu family. Is it not, so that the mother cannot of her own hand adopt a son so as to make him a member of that family?

Mr. Mayne.—She cannot.

Sir Richard Couch.—A wife cannot without her husband adopt a son to the husband.

Mr. Mayne.—No, and she cannot create a relationship of maternity with a given boy except as the secondary result of having created the relationship of paternity between that boy and her husband.

Lord Watson.—The doctrine laid down by Sir William Macnaghten is this that although she cannot do it herself, the husband can adopt the son to her. She is his wife; the boy becomes the son of his wife when he becomes his son. But Sir William Macnaghten seems to suggest that the husband has even a stronger power than that, that he can select the particular wife, and make his adopted son the son of that wife in the sense of making her a primary heir of the adopted son.

Mr. Mayne.—He says he cannot do this when he is making an adoption himself.

Sir Richard Couch.—Does he actually say that as his opinion?

Mr. Mayne.—Yes, he says it is admitted.

Sir Richard Couch.—His language is this—we shall have to look at it carefully no doubt. He says "And those who contend that the property "should be taken by the single widow do so on the ground that although

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"had there been no adoption, the three widows would have been entitled "to equal shares, and although had the childless husband adopted the "boy during his lifetime, he could not have selected for him as adopting "mother, one of his three wives." I do not understand that he is stating that as his own opinion.

Mr. Mayne.—I submit that he must be stating it.

Sir Richard Couch.—I understand you are submitting that, but it will be a matter for consideration.

Lord Watson.—He states what is said against it, by those who object.

Mr. Mayne.—What I put to your Lordships is that every one agrees that it cannot be done during the life of the father.

Sir Richard Couch.—I am not satisfied with that, at present, at all events.

Mr. Mayne.—According to him the only question that is raised is what may take place.

Sir Richard Couch.—We shall have to see what authority there is for your submission.

Mr. Mayne.—Of course.

Lord Watson.—It is in the nature of making his will. If the husband has power to do that it implies that he has the right, in selecting a particular wife, to direct that in the case of succession that wife shall succeed to the adopted son's estate, to the exclusion of his other wives.

Sir Richard Couch.—The difficulty arises here from the fact of this being impartible property, and only one of the wives can succeed. He does not go so far as to say they must both succeed.

Mr. Mayne.—Only one can succeed.

Sir Richard Couch.—Which is to succeed? That may throw some light upon what was the Rajah's intention, in selecting this particular wife to be present at the adoption.

Lord Watson.—It may account for the different effect of his indicating that intention by an act performed by himself during his own lifetime, and the effect of a deed or act performed by his wife by his authority after his death. He could not any longer speak to his wife so as to regulate the succession.

Sir Richard Couch.—I think we must take it he was conscious that there would be a difficulty with regard to the succession of these wives—that their might be, at all events,

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Mr. Mayne.—If he had made a Will, or made an assignment he might have directed the succession of his property to any one he wished.

Sir Richard Couch.—He did not like to have it done after his death. He wished himself to make the adoption.

Mr. Mayne.—The question is whether this act does by implication overrule what would be otherwise the right of the senior widow to succeed.

Lord Watson.—What has been held against you is that his act performed during his life made his estate descendible upon a failure of his adoptive son, to the widow whom he had selected to be present at the ceremony.

Mr. Mayne.—That is what is suggested. What your Lordships have to decide is whether the fact that she was present at the ceremony produced that change and conferred that superiority upon her. I submit it was absolutely inoperative.

Sir Richard Couch.—What else could have been done?

Mr. Mayne.—I say nothing else could be done, and nothing would follow from it. That is the question which your Lordships have to decide;—Whether bringing in a person whose presence was absolutely unnecessary and inoperative as regards the adoption—for there is no doubt whatever as regards the adoption that it was both unnecessary and inoperative—whether by making an adoption in a particular way he altered the rights of somebody who happened to be present at the time. That is the proposition.

Lord Watson.—There is no doubt that the adoption, so far as he was concerned, and the connection of his adopted son with his estate was concerned, would not have the less effect, although none of the wives were present.

Mr. Mayne.—Can you by a side wind import into an act which produces one particular result, a result which adoption itself has no action to produce upon another person?

Sir Richard Couch.—I do not know that it will help us much to use the metaphorical expression of "side wind." We know exactly what was done. We shall have to consider the effect of his having selected this wife to be present.

Lord Watson.—There seems to be no reason why it should not have the effect ascribed to it, if it be according to Hindu law.

Lord Davey.—Is there any authority except that opinion of Sir William Macnaghten in his preface to which you referred us, for say-

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ing that a husband might select one of his wives to be the mother of his adopted child.

Mr. Mayne.—I will not pledge myself, because I am going to place every authority that I know of before your Lordships, and I do not think my learned friend can find any others.

Lord Watson.—I do not think Macnaghten goes the length of saying that a father making adoption can exclude his other wives from motherhood. He only says that he confers motherhood in a different sense on a person whom he selected to attend, than on those he elects should be absent, that the latter do not take as heirs in the same way—do not take as if they were mothers of the deceased, because the wife selected to attend takes first as the heir. She is senior wife.

Sir Richard Couch.—When we have all the authorities we shall be in a better position to judge.

Mr. Mayne.—I am taking them in order of date. The next authority I wish to refer to is Sir Francis Macnaghten in his Hindu Law, page 171. He is stating the progress of a case. There was a direction to adopt in a will. "Directions were given for the adoption of a son "according to its provisions. Such vexation as might have been fore-"seen was the consequence. The widows could not be brought to con-"cur in the selection of a boy for adoption. The Master's report was "confirmed and this furnished matter for further contention. The boy "Taracomar was to be adopted—but the question was which of the three "widows had a right to receive him in adoption." Then Sir Francis in "his usual confidant manner goes on:—"The law is clear and was undis-"puted. The boy could not be received by the three widows jointly. "He must be received by one of them—and would then be considered as "the son of the widow by whom he had been received—about this there "was not, because there could not be any dispute." That is his opinion. With what follows I need not trouble myself. There is certainly no want of certitude in that opinion.

Lord Davey.—Does Sir Francis Macnaghten usually write in that strain?

Mr. Mayne.—I had occasion to quote a similar opinion of Sir Francis Macnaghten in a recent case, as confident as that, and your Lordships, I am sorry to say, in that case, did not pay any attention to it.

Lord Hobhouse.—I think we paid attention to it, but we found other authorities the other way.

Mr. Mayne.—Then in the Appendix at page 11, there is the statement of a Brahmin who is called upon to give testimony, I suppose it

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is, in this case, or evidence as an expert on the law of adoption. It is page 10. In the case of Srimati Degumbeery v. Srimati Taramoney. "(2). A Brahmin leaves three widows, and a child is directed to be "adopted, which of the three widows is to receive the child on its "adoption?"

Lord Davey.—What was the direction, that the widows should jointly adopt?

Mr. Mayne.—In the other case I think the master selected the person.

Lord Davey.—What did the testator or the deceased direct?

Mr Mayne.—He directed that there should be an adoption.

Lord Davey.—Without saying by whom.

Mr. Mayne.—Without saying by whom.

Lord Davey.—That would mean that they all jointly should adopt.

Mr. Mayne.—Then the master reported. What took place was that the first widow founded her claim to receive this child, upon seniority.

Lord Watson.—In that case the question was complicated by the existence of a will.

Lord Davey.—Supposing that a man having three wives directs that a son shall be adopted, would not that be a power to the three wives to adopt jointly?

Mr. Mayne.—If he directs the three wives to adopt they must adopt jointly.

Lord Davey.—Supposing he directs a son to be adopted, and nothing more, it can only be by the wives.

Mr. Mayne.—It could only be by the wives.

Lord Watson.—I should think if he left three wives, and two of them were naturally very undesirous to adopt because he could deprive them of their right to the estate, the third widow, in that case could make an adoption. In the case you quoted at page 171, he left a will, and he left A and B to adopt jointly, failing that B and C to adopt jointly, and it was held under the will that the favoured widow was B, because she was entitled to adopt in any event.

Mr. Mayne.—There was a pregnancy and he says: "If any harm "happens to that child my three wives shall adopt a son with mutual "consent. If they three, do not agree, in that case, my eldest and "second wives shall with mutual consent, adopt a son, and if they dis-

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"agree, my youngest and second wives shall adopt a son with mutual "consent, and that adopted son shall be owner of my wealth, and hold "the right of performing the ceremonies to be performed after me and "nobody else shall have any concern with all the above estate and so "forth. If my three wives continue in the performance." His intention obviously was that two of his three wives should agree. It should either be the eldest and the second, or the youngest and second. The will is at page 9 of the Appendix. Then a Pandit is examined. "A "Brahmin leaves three widows, and a child is directed to be adopted, "which of the three widows is to receive the child on its adoption" ? This question is put purely without any reference to the will. The answer is: "The widow of the Brahmin who had a child of her own." Where he gets that I do not know. "(*Q.*) If one of the widows is re- "lated to the child, it being her uncle's son, can she receive the child? "(*A.*) No, that is an obstacle. (*Q.*) On the part of defendants. Where "is the law prohibiting the widow who is related to the child from "receiving the child if the husband directs the adoption? (*A.*) It is to "be found in the Dattaka Chandrika and Dattaka Mimansa and "in other books. (*Q.*) Is it prohibited for a husband to adopt his wife's "relation? (*A.*) It is not prohibited generally, but some relations "cannot be adopted." Then these are all prohibitions against relations. Then comes something which is important. "(*Q.*) Can three "widows adopt, one of them being related to the child? (*A.*) Only one "can adopt. The three may agree upon the child to be adopted, but "one of the widows can adopt. (*Q.*) Does the child so adopted become "the child of the widow adopting, or the child of the three? (*A.*) The "child becomes the child of all three. (*Q.*) Suppose the child to die "after adoption, which of the widows inherits his property? (*A.*) The "widow adopting him if he should die under age, she will be called "the mother, and the others the step-mothers. (*Q.*) Suppose one of the "widows at first to have opposed the adoption, but afterwards agreed "to it, can she be the person to adopt? (*A.*) Yes, after she has agreed "to it. Her former opposition will not stand in the way of her being "the person to receive the child in adoption. (*Q.*) Which of the widows "is the person to have the care and management of the child adopted? "(*A.*) It is not stated particularly in the Shastras. All three ought to "take care of him. (*Q.*) Suppose the widows to disagree and separate "which of them is to have the custody of the child? (*A.*) The widow "who adopted the child, she may take the child with her."

Lord Watson.—Apparently the whole result is this. It is an examination in the Master's Office. It comes to this that after the death of

the Brahmin who leaves a general authority to his three wives to adopt a son to him; the three wives can adopt a son, but only one of them can perform the ceremony, and that upon the ceremony being performed by that one, the child becomes the child of all three.

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Mr. Mayne.—Yes.

Lord Hobhouse.—If only one can have the inheritance who is to have it? That is the point.

Mr. Mayne.—Now, my Lords, there are two cases in Bengal which are referred to in this case which I put before your Lordships. The first is a case in what is called the 'Gap' number of the Weekly Reporter. There seems to have been a gap left by Sutherland in his reports between January and July 1864. It is Sutherland's Weekly Reporter. There is a case at page 71 of that volume. "On the death of a son adopted by a Hindu as the son of one of his two wives, the property descends, not to the other wife, but to the next legal heir." I will read the Judgment of Mr. Justice Bayley. "In this case plaintiff Kasheeshuree, alleging herself to be the first wife of one Kalee Kant, sued in "1268 for the recovery of the property real and personal left by Saroda "Pershad, the allegation that it reverted to her as legal heir on the "demise first of Mon Mohinee Debia, the second wife of Kalee Kant, "then of Saroda Pershad, the adopted son of Kalee Kant. Plaintiff "also sued for stridhan, and she averred dispossession by defendants "on the 10th Joysto 1226. Plaintiff added that a will purporting to give "her a maintenance was spurious. Further, plaintiff in her written "statement alleged that the adoption of Saroda Pershad was done with-"out plaintiff or Mon Mohinee joining their husband in the act. Her "claim now is as mother of the adopted son. The defendant, a nephew "of Kalee Kant, appears and claims as next heir to Saroda Pershad, and "answers that Kalee Kant adopted Saroda Pershad as the son of his "second wife Mon Mohinee." That is a very different thing from his merely joining her in the adoption.

Lord Davey.—It seems that a man can adopt a child as the son of a particular wife.

Mr. Mayne.—That is what he did there—"And that Kalee Kant "stated to the judge by petition, and generally on other occasions, that "Saroda Pershad was adopted by him and by his second wife Mon "Mohinee, that the first wife was by a good and valid will left a main-"tenance, and that defendant had not dispossessed plaintiff of any "stridhan. The Judge held that Kalee Kant, by the will and various "acts, was proved to have adopted Saroda Pershad, as the son of his

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"second wife Mon Mohinee, and that consequently plaintiff's claim, as "mother of the adopted son was invalid. He therefore dismissed her "suit for the property of Saroda Pershad, referring her to a separate "action."

Lord Davey.—He treated her as not even a step-mother; as no "relation."

Mr. Mayne.—As no relation whatever. "Plaintiff appeals from "his decision, and her contention here is one of law, and not upon the "facts. It is that both wives under Hindu Law are equally adoptive "mothers; and as such, both or the survivor are entitled to inherit "before a nephew, and that, as survivor of the two wives in this case, "she is the legal heir to the property of Saroda Pershad." Now the Judgment is this: "We are of opinion that this position has not been "borne out by Hindu Law books or precedent. As to the former there "have been cited Colebrooke's Hindu Law, Volume III, page 100, "and Strange's Hindu Law, Volume I, page 87." Those I have looked at and I do not think they have any bearing on it,—"Macnaghten, "Volume II, page 62, S. D. A. Rep., 30th July 1859, page 1099." That I have read and there is nothing in it. "Ditto Select Reports, Volume "II, page 27, 4th August 1812." That there is nothing in. If there is my learned friend will be able to show it. "The passage relied upon "from Colebrooke is, with reference to the use of the singular janani to "denote the natural, and matarah the plural of matri to denote step-"mothers; and where there are these words used accidentally, Vaches-"pati Misra expounds 'on failure of him,' on the death of the father; "'natural' mother's (janani), she who has a son; 'mothers' (matarah) "step-mothers who have no male issue, all these shall have equal "shares with the sons.' But this text does not apply to the facts of this "case. Those facts are that the father Kalee Kant did adopt the son "for Mon Mohinee only, and therefore the boy is her adopted son, and "on her death his property would go by Hindu Law, not to a step-"mother, but to the next legal heir, such as the nephew is here. To the "passage from Strange relied on by appellant, the above remark equally "applies, and it may be added that it is clear (*vide* Chapter 4, Section "1, pages 97-8, Ed. 1830), that, in stating that the adopted son is son to "both adopting father and mother, it is intended to say, son to that "mother as whose adopted son he is taken. The case in Macnaghten "in no way assists appellant's case, but rather the contrary."

Sir Richard Couch.—I should doubt whether this decision will help us much, because it came before the Court on a Special Appeal, and it

was found as a fact that he was adopted as the son of the second wife. That was found as an actual fact. Annapurni Nachiar v. Forbes.

Mr. Mayne.—Yes, and they found also that by his will he disinherited the second wife.

Sir Richard Couch.—The High Court could not deal with that at all, they had only to consider whether it was possible in law for him to be adopted in that way.

Lord Davey.—That is what Mr. Mayne quotes it for.

Mr. Mayne.—No, I do not quote it for that, but only because it is one of the decisions relied on. It is one of a series of decisions which I am placing before your Lordships. I submit that the decision is wrong, but it is a very different decision because it states that "he stated to "the judge by petition, and generally on other occasions, that Saroda "Pershad was adopted by him and by his second wife Mon Mohinee, "that the first wife was by a good and valid will left a maintenance." This adoption seems to have been part of a scheme followed up by his disinheriting her of anything but her maintenance.

Lord Davey.—It shows this, that as a matter of law he could select one of his wives to be the mother of his adoptive son, and exclude the others.

Mr. Mayne.—It shows that the Court thought so.

Lord Hobhouse.—The passage you read from Sir William Macnaghten seemed to deny that.

Lord Davey.—Do you admit that a man may adopt a child as the child of one particular wife.

Mr. Mayne.—I do not. I admit that he can disinherit his wife.

Sir Richard Couch.—If you do not admit that, this remark arises upon this very case, that if as a matter of law that could not have been done there would have been ground in this special Appeal to have taken that point, which was not taken.

Lord Davey.—This is one of the cases relied on by the other side.

Mr. Mayne.—Yes, and one of the sequence of cases I am putting before your Lordship, because I think it is more convenient for you to have all the authorities *pro* and *con*.

Lord Watson.—The commentary made is in reporting a case which had actually occurred.

Mr. Mayne.—Well, my Lords, that is that case; then the next case is in the 3rd Weekly Reporter, page 49.

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Lord Hobhouse.—That would be prior in time to the case you have quoted.

Mr. Mayne.—No, this case was in 1865, the year after. The side note is "An adopted son has all the rights and privileges of a son born, "and is also entitled to succeed to the stridhan of his mother in the "absence of daughters in like manner as a son born, whether there be "or be not a will in his favour. A woman cannot execute a will "regarding any property she inherits from her husband or her father. "With regard to stridhan however she can dispose of it at pleasure "either by gift, will or sale (except immoveable property given to her "by her husband). A son adopted by one wife may succeed to a co-wife "stridhan." At the end of the judgment the Court says.

Lord Davey.—What Court is this?

Mr. Mayne.—The High Court of Calcutta. "It has also been asked "by the learned Counsel for the respondent, whether a son adopted by "one wife, would be looked upon as the son of a co-wife and succeed to "her property. Though this question does not arise we may point out "that the Hindu Law of inheritance provides even for this case and "mentions the son of a contemporary wife among the heirs of a woman "entitled to succeed to her stridhan. In the case before us as the "Court has found that the adoption is valid and that the property in "dispute belonged to Nubo Manjuree as stridhan we now hold that "plaintiff as her adopted son is entitled to succeed to that property in "the absence of daughters."

Lord Watson.—That case only touches this point very briefly— "It has also been asked by the learned counsel for the respondent "whether a son adopted by one wife would be looked upon as the son "of a co-wife and succeed to her property. Though this question does "not arise we may point out that the Hindu Law of Inheritance "provides even for this case, and mentions the son of a contemporary "wife among the heirs of a woman entitled to succeed to her stridhan." There is no question of that sort.

Mr. Mayne.—No, the only decision was whether in regard to a person who is admittedly the adoptive mother—it does not say how she came to be so—probably after her husband's death.

Lord Hobhouse.—I see looking at this case it was a regular appeal, not a special one—the case in the special number of the Weekly Reporter.

Sir Richard Couch.—It comes to much the same thing, because although it was a regular appeal the only ground of appeal taken by

the plaintiff was that it was a question of law. It is headed "Regular Appeal" but it seems to have been argued as if it were a special appeal. They did not raise any question of fact. They did not question the finding of fact of the Lower Court.

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[Adjourned for a short time.]

Mr. Mayne.—My Lords, West and Bühler's Hindu Law has been quoted in this case, and I refer your Lordships to what they say at page 1181. I have the 3rd Edition. "Relation between adoptive step-mother and son." This your Lordships will remember is founded upon Futwahs. "The adopted son succeeds to all his step-mothers." Then there is a reference to some manuscript, a Fatwah I suppose. Then they quote Colebrooke's Digest, the passage from Jagannatha which I have quoted, and they refer to another case which has nothing to do with this. Then they say: "On the death of one adopted son of one or two co-wives [reading down to the words]—or adoptive father." Then they refer to the case of *Kasheeshuree Debia* v. *Greesh Chunder.*

Mr. Jardine.—That is in the gap volume.

Mr. Mayne.—That is the case I cited to your Lordships. Then in the next page they say: "A son adopted by one wife may succeed to "the stridhan of another co-wife." Then they refer to the decision I quoted in 3rd Weekly Reporter. Then they say "In another case [reading to the words]—succession to her husband." The whole importance of this is that one statement: "The importance of the right to adopt "as between two or more widows becomes evident when it is borne in "mind that the one taking the place of mother succeeds first to her son on "his death without child or widow." That is a case of a widow adopting after the death of her husband under an authority from him. Now, my Lord, those are all the authorities as far as I know that are in existence. The only decided cases are those two in the 3rd Weekly Reporter—(that is an *obiter dictum* in my favour)—and the one in 1864 at page 71. Those are really the only authorities in the case. Now, my Lord, I will read the judgments. The original Court judgment begins at page 717 of the Record he says: "I now come to the question as to the nature of the adoption ceremony actually performed," &c., &c.

Lord Watson.—She was related to the adopted son. Could she be the mother of her own nephew?

Mr. Mayne.—Apparently there is no objection made to the validity of the adoption on that ground. "I find then that it has not been satisfactorily proved by the first Defendant," &c., &c. Then Colebrooke's

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Hindu Law, 4th Edition, page 394. That is the passage I read to your Lordships from the 3rd Volume of the old Edition.

Lord Hobhouse.—It is merely a question here whether he has excluded the other wives from all interest; but the fact being that only one wife can take as heir to the son, which wife is it to be?

Mr. Mayne.—Unless he has by this proceeding given a preference which is valid in law, to one wife over the other, the senior wife would take.

Lord Hobhouse.—That is your argument no doubt, but it is not the question whether he has excluded all the other wives.

Mr. Mayne.—No—whether he has given a preference.

Lord Hobhouse.—Supposing the adoptive mother died, then another wife would have come in.

Mr. Mayne.—Yes.

Lord Hobhouse.—The question would be who would be the heir to the son?

Lord Davey.—The step-mother could not be heir to the son.

Mr. Mayne.—If she was the step-mother only. My contention all along is that she is a mother and not a step-mother. Step-mothers do not exist under adoption. Then he quotes that passage from Colebrooke's Digest which I have already read.

Lord Hobhouse.—The passage in West and Bühler seems to contemplate that the one who takes the principal place succeeds first to her son: but not that the others are all excluded.

Mr. Mayne.—No, but the person who makes the adoption after her husband's death, and I think there is a great difference between the two cases.

Lord Hobhouse.—What I am thinking of is, the nature of the succession. The succession spoken of is not one which excludes the others from coming in afterwards. They may be reversionary heirs to the son.

Sir Richard Couch.—It is not used in that strict sense.

Mr. Mayne.—He goes on " A review of the above authorities makes it clear I consider that in Bengal at any rate, " &c., &c., [Reading down to the words,] one of the essential "elements in the ceremony of adoption is the receiving of the adopted boy by his adoptive parents." I utterly deny that that "S" should be there "and "when the authors of the Dattaka Mimansa and the Dattaka Chandrika,

&c., &c., [Reading down to the words] "Must be quoted for so applying it." My Lords, I submit that that passage is based upon a complete error in supposing that it is part of the ceremonial that both parents should receive, and that there should be a receiving mother there. I think I have shown beyond all doubt that there is no basis whatever for that; that if there is a mother there, and if the child is put into her lap it has nothing rightly to do with the adoption which is complete as soon as it has been put into the hands of the father. And therefore the presumption that they intend to refer to the woman who actually officiates as the receiving mother at the ceremony of adoption is utterly unfounded. If there is no mother present at the adoption, if they are all behind the purdah, who is the receiving mother? There is no receiving mother in that sense of the word. Then it would necessarily follow that if there is no receiving mother there is no adoptive mother which is absurd. Now I do not understand this because they take it apparently that one mother is the mother of one child, and another mother is the mother of another child. Of course I do not rely upon anything of the sort. Then at page 723 "It appears to me that the opinions of the Bengal authorities," &c., &c., [Reading down to the words,] "The property of his adoptive mother is eventually settled." Then they refer to the cases, the last of which is your Lordship's decision in 10 Indian Appeals, page 138. It goes on "In the last decision it is observed," &c., &c., [Reading down to the words,] "the mother who makes the adoption in conjunction with the adoptive father." Now here he goes entirely upon the assumption that whenever you find the words "adoptive mother" in these works you must read them as "receiving mother," and that you must read "receiving mother" as meaning the mother who is actually present and takes a part in the ceremony, which I submit to your Lordships there is not the slightest foundation for in the works that I have read. They do not contemplate the case of there being different wives, and one particular wife taking a position different from all the others. It is a point that is unsettled. There is nothing to be found in those works, bearing upon the subject. "By these texts, the fiction of motherhood is only permitted with respect to the receiving mother," &c., &c.

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Lord Hobhouse.—There is such a precept then in the books as that the senior wife should be selected for performing a religious ceremony.

Mr. Mayne.—There is, I think, it is somewhere in Manu but I cannot give your Lordships the reference. Now, my Lords, the decision of the

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High Courts is at page 753. The passage I refer to begins at line 35, page 755. "The Judge has found that second respondent as the receiving mother is entitled to succeed in preference to the appellant." Then he quotes his authorities down to West and Bühler. Then on page 756, line 6, he goes on "No doubt the writers above referred to have "cited no authority for the views expressed by them" &c., &c., [Reading down to line 41]. My Lords, the word "pratigrahitri" is the only word in Sanscrit for expressing the relations between a person who takes a child in adoption, and that child. "The fact that adoptions under "the Hindu Law are for the benefit of the man," &c., &c., [Reading the remainder of the Judgment]. Then Mr. Justice Shephard says "I concur with Mr. Justice Best in his conclusion," &c., &c., [Reading to the words,] "in preferring to associate his other wife in the ceremony of adoption."

Lord Davey.—If these learned Judges are right supposing the property were partible it would equally go to the mother.

Mr. Mayne.—Yes, it would equally go to the one mother, and also according to the decisions which they adopt on the death of that mother, it would not go to the co-wives. The other wife would be only a step-mother. It would go away to other people.

Lord Davey.—To the father's relatives.

Mr. Mayne.—Yes. "The question which arises is what is the "precise relation between the co-wives of a Hindu who adopts a son "and that adopted son?" &c., &c., [Reading down to line 47, page 759.] "What may be supposed to be contemplated is that the son will "succeed on the death of that wife."

Sir Richard Couch.—He would succeed on his father's death would not he?

Mr. Mayne.—Of course he would.

Sir Richard Couch.—He would not be postponed till the death of the wife. That is a mistake.

Mr. Branson.—No, it is the wife's property.

Mr. Mayne.—He may be talking of the wife's property. I do not think he is. What he means is they do not contemplate the event that the wives will survive the adopted son, but that the adopted son will survive the wives. I think that is what he means, in which case no question of the sort would arise. "It cannot be denied that a Hindu having two wives," &c., &c., [Reading to the words,] "and thus enable her to defeat the expectations of the other."

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Sir Richard Couch.—He gives the authority to adopt, and he can select which of the wives he thinks fit to give authority to.

Mr. Mayne.—Of course he can, and that authority must be strictly followed.

Sir Richard Couch.—This is not a case of giving authority.

Mr. Mayne.—No.

Lord Davey.—It is admitted that the wife who has the appointment after his death stands in the place of the mother.

Mr. Mayne.—I do not know that it is admitted.

Lord Davey.—It is so stated.

Mr. Mayne.—In West and Bühler it seems to be taken for granted.

Lord Davey.—And in Sir William Macnaghten's preface I think. However we need not discuss that.

Mr. Mayne.—No, your Lordships have all the authorities now before you.

Lord Davey.—That is the argument.

Mr. Mayne.—That is the argument. "The proposition that both "wives or both widows together constitute the mother of the adopted "son," &c., &c., [Reading down to the end of the Judgment].

My Lords, I have now put all the cases before your Lordships, and I think I have nothing more to add to what I have said in the course of the argument.

Mr. Jardine.—May it please your Lordships. In this case my learned friend has put your Lordships in possession of, I think, all the authorities that bear upon the point which will have to be decided. I submit that there is nothing inconsistent with the principles of Hindu Law in the contention we put forward as the correct one, namely, that a husband in adopting a son for his benefit can favor one wife rather than the others by putting her in a closer relationship, that is, more imitating the relationship of nature, than that of the co-wives.

It is a subject which is somewhat singularly bare of authority. When one goes to the text one might have expected to find in the ancient books on Adoption that such a somewhat obvious question might have been foreseen and discussed and considered, but we find very little assistance from the Dattaka Mimansa or the Dattaka Chandrika. It is true, as Mr. Mayne says, the author seems to be, throughout, considering in his mind rather the case of one wife. You may almost read the book through with reference to adoption and not grasp the

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fact that polygamy was the rule, and that there should be more wives than one. Still, if we take the texts that have been cited, and they are the only texts I think bearing on the matter, and take them literally, as the Judges of the Court below have taken them, they apply to the receiving mother. The word is "receiving mother." My learned friend says that you are asked for "adoptive mother" to read "receiving mother." It is rather the converse. If one takes the word literally it is "receiving mother," and it has been turned into "adoptive mother" as a convenient way of referring to the adoptive mother.

Lord Hobhouse.—That is what they tell us, that they are translating more accurately than the present text books.

Mr. Jardine.—More accurately than Mr. Sutherland; that what Mr. Sutherland has translated "adoptive mother" is "receiving mother." It is not contended that that is not the case. That is the case literally.

Lord Hobhouse.—I do not know whether there is any essential difference between the two.

Mr. Jardine.—That may or may not be. I do not wish to press it unduly. I merely mention it, that if one takes the thing literally it only confers the peculiar relationship on the receiving mother. Of course one gets somewhat into the regions of presumptions in making such a suggestion, but so far as adoption is fictional, yet an imitation of nature, it would make a closer imitation of nature to assume that one of the wives should have a closer relationship to the adopted son rather than that he should have a general relationship to be a child of a number of mothers. In nature he could be a child of only one mother. The fiction may be otherwise, but one would imagine it would be a more natural fiction to imagine an adoptive son the son of one mother than to say that he was to bear the filial relation to a number.

Lord Hobhouse.—We are not the judges of the degrees in fiction.

Mr. Jardine.—I quite agree.

Lord Hobhouse.—When you get into fiction there is nothing to go upon but authority.

Mr. Jardine.—I do not wish to press it unduly. No doubt that is so. An argument is founded for example on the text of Manu that by the birth of male issue to one of several wives, each of the wives is to be judged to be the mother of male issue. In the Sloka preceding that your Lordships will see precisely the same thing said with reference to a number of brothers. That if one of several brothers is the father of male issue the other brothers are to be deemed the fathers of male issue

also. But in neither of those cases does it affect inheritance. I quite grant that in a secondary sense all the wives of an adoptive father may be deemed to be mothers, and may get the benefit of male issue being born in the family.

Sir Richard Couch.—It would make the case of an adoption made by the husband in his lifetime in a very different position from an adoption made by his widow after his life.

Mr. Jardine.—Mr. Mayne would argue that.

Sir Richard Couch.—In one case all the wives would be entitled to succeed.

Lord Hobhouse.—Your strongest analogy is the case of a natural son of one wife. It is distinctly declared that all the wives are the mothers of male issue, and yet for the purposes of inheritance the natural mother has the priority over the others.

Mr. Jardine.—Yes.

Sir Richard Couch.—Can you say that where the husband makes an adoption in his lifetime, he has not some power of indicating whose son of the different wives the adopted son should be; or is it to be left in uncertainty? If he gives a power to adopt there is no difficulty.

Mr. Jardine.—Looking at it from the point of view of a Hindu, a Hindu has power to choose on which of his wives he will beget his natural offspring. Looking at it with a Hindu mind, I take it it would seem to them just as natural that he should say which wife should be the mother of a fictional offspring. There would be nothing repugnant to Hindu ideas in such a thing.

Lord Watson.—That expression, the other wives becoming mothers, is not of a very clear and satisfactory character. It would be doubtful precisely what it means, and in what sense it is used. I understand that in the case of a Hindu having several wives, whenever one of them has a child, a son, the other wives are in a sense mothers of that son.

Mr. Jardine.—In a sense, yes.

Lord Watson.—But then its own mother is also the mother and no more. She is the natural mother. Supposing there is a change in the family, the Hindu dies succeeded by that son; upon the son's death his heir is his natural mother, not his other mothers.

Mr. Jardine.—Yes; others are mothers in a certain sense, but not in the sense of succession.

Lord Watson.—The tie of maternity becomes theirs through the act that they are members of the family, and wives of his father.

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Mr. Jardine.—Yes; they would be mentioned in the offering of the oblation as wives of the father.

Lord Hobhouse.—They would get all the spiritual advantage of having male issue.

Mr. Jardine.—Yes.

Lord Watson.—Supposing the natural mother died; on his death the non-natural mother would succeed.

Mr. Jardine.—On the death of the son? A son born to one wife.

Lord Watson.—A son born to one wife. And on the son's death the wife who did not receive him in adoption I suppose would succeed.

Mr. Jardine.—No. It would go to the adoptive father's nearest heirs.

Sir Richard Couch.—The mother would succeed for her life upon her son's death; and then at her death you would look in the father's line for the heir. Another wife would not succeed as heir.

Mr. Jardine.—No. The fact that this seems to point to religious affection I think is borne out.

Sir Richard Couch.—In fact what you have to do is this: you would have to find out who was the son's heir on the death of his mother who only took for life; and then it would go to the person who was heir to the adopted son. You would not go to the father, you would see who was the son's heir.

Lord Hobhouse.—You may have to trace through the son, possibly.

Sir Richard Couch.—You would find out the heir of the son: that is what you would be doing.

Mr. Jardine.—Exactly. I think what I say about being a matter of religious affection is borne out by that exactly. Take the case of a family of brothers, one of whom has male issue; it is to be held that all the brothers are the fathers of the male issue. That is in Manu immediately preceding the Sloka which deals with the wives all being considered to be the mothers of the male issue.

Sir Richard Couch.—That can only be for spiritual purposes—not a question of inheritance.

Mr. Jardine.—It is quite clear in the brother's case no inheritance comes into the matter. It looks like a matter of religious affection.

Well now, it seems to be pretty generally conceded that the Hindu has power after his death to select a widow to make the adoption.

Sir Richard Couch.—He can make that selection in his lifetime.

Mr. Jardine.—Yes. He can put one widow in a superior position with regard to the others as being the one who may choose the adopted son. He also puts her, according to most of these authorities, in the position of a natural mother to the boy whom she may adopt to him after his death. Now in what way is that? That is merely by the expression of his intention; of his will, he can make her after his death a natural mother of the adopted son. He can give her the legal position of a natural mother as against the co-wives.

Lord Watson.—He gives her the power to make the adoption. That implies two things: first to select a boy who is to be adopted; and in the second case to perform the ceremony necessary for the purpose of admitting him to the deceased's family.

Sir Richard Couch.—He goes further; he goes so far as to make her the heir of the adopted boy.

Mr. Jardine.—I do not say it is conceded by Mr. Mayne, but he concedes it to this extent that the authorities make a difference between that case and the other one. He can after his death put one of his wives in a position of being its natural mother for legal purposes. Now in principle is it to be said that he can do this for one of them, that his volition is to have this effect that she can adopt a boy and become in the eye of the law a natural mother; but that in his lifetime he cannot by any expression of his volition put her in the same position?

Lord Davey.—Is it established by decision that a wife, one of three or more wives, adopting a son by the permission of her husband, after his death, is placed in the position of a natural mother?

Mr. Jardine.—It is established by decision in the case in what we have called the Gap number of the Weekly Reporter.

Sir Richard Couch.—On the death of the son she is the heir?

Mr. Jardine.—Yes: that has been held. That is the only recorded decision on that point.

Sir Richard Couch.—She is the heir just the same as if the adopted boy was her own son.

Mr. Jardine.—Exactly. That case is exactly in point on that. The *obiter dictum* in 3rd Weekly Reporter assumes it.

Sir Richard Couch.—That is well settled law.

Lord Watson.—I do not think it is disputed that in that case the wife making adoption by the husband's Will is in the same position as regards his inheritance as if she had been his natural mother.

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Lord Davey.—I do not understand Mr. Mayne to concede that.

Mr. Jardine.— He did not concede it.

Mr. Mayne.—I said it was not necessary to argue it.

Lord Davey.—It seems to me if that point is established it goes a long way to establish your case.

Mr. Jardine.—Precisely. It would be somewhat illogical, not that in matters of Hindu Law that is conclusive, but it would be illogical to hold that his volition should be able after his death to put one of his wives in the position of a natural mother to an adopted boy; but that during his lifetime no expression of his volition or will with regard to his wives could effect the same purpose.

Lord Hobhouse.—Can you put your hand on a definite authority for saying that where the husband has given permission to one wife to adopt she becomes in the position of a natural mother of the boy?

Mr. Jardine.—I do not think there is any authority other than those which have been cited. In Sir Francis Macnaghten's case the pundits are clear on the point; and Sir Francis' opinion was quite on that point.

Lord Hobhouse.—It all rests on pundits.

Sir Richard Couch.—I cannot find it just now, but there has been a case before this Committee in which that law was taken for granted, and was acted upon.

Lord Hobhouse.—It seems to you to be familiar law?

Sir Richard Couch.—Yes; I cannot remember the case, but it was a case in which an adoptive mother had succeeded as heir to the adopted son, and then some question arose upon her death as to what should become of the property.

Lord Davey.—It is not decided here, but it is assumed, and perhaps that is stronger.

Mr. Jardine.—It was assumed and the case was decided upon that basis.

Lord Davey.—It was not argued and decided?

Lord Watson.—In that case reported by Sir Francis Macnaghten at page 171—"The Master's report was confirmed and this furnished "matter for further contention. The boy Taracomar was to be adopted—"but the question was which of the three widows had a right to receive "him in adoption. The law is clear and was undisputed. The boy "could not be received by the three widows jointly. He must be

"received by one of them—and would be considered as the son of "Luckinarain and the widow by whom he had been received." That clearly has reference to inheritance.

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Lord Davey.—Is it true that he could not be received by the widows jointly?

Mr. Jardine.—He could not.

Lord Hobhouse.—Mr. Mayne jeered at the confidence of that opinion. It is true it rests on the pundits.

Mr. Jardine.—He could only be received by one widow.

Lord Watson.—Is it in the power of a Hindu to give such directions after his death that a son shall be adopted by his widow, and that all his widows shall have the right of inheritance?

Sir Richard Couch.—He could by his Will.

Lord Watson.—No doubt all that is contended for here might have been regulated by will, to a certain extent. It is here laid down that the boy must be received by one widow, and must not be received by the widows jointly, if the adoption is after his death. There must be an actual process of receiving into the family, and that can only be effectively done by one widow, and that widow becomes as a necessary result of the operation *in loco* of the child's natural mother. Of course the father, the deceased, could have made matters different if he was the proprietor of the estate by regulating the succession by Will. It suppose he could regulate it so as to leave it on the death of his adopted son to one of the mothers in preference to the rest.

Mr. Jardine.—I imagine he could have done it.

Lord Watson.—I speak with caution upon that point.

Mr. Jardine—I imagine he could in this case. If it had been ancestral there might have been a difficulty.

Lord Hobhouse.—Sir Francis Macnaghten carries the case a good deal further, because he contemplates the case of several widows who have all equal rights.

Mr. Jardine.—Yes.

Lord Hobhouse.—And he says only one can receive.

Mr. Jardine.—He makes out that the mere act of receiving does it.

Lord Hobhouse.—It is a necessity that only one can receive, and the one who receives stands in the relation of mother.

Mr. Jardine.—Yes, he puts it stronger than Sir William Macnaghten who conceives that the husband could by the unequivocal ex-

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pression of his Will put one in that position. Sir Francis Macnaghten goes further and says the one who actually receives the boy becomes in the possession of the natural mother.

Lord Hobhouse.—And that, although the rights were co-ordinate before the adoption.

Mr. Jardine.—Yes, such authority as there is both, in the cases in the Weekly Reporter, and of opinions that have been expressed (although they say it is somewhat bare of authority) are all more or less in the one direction, the direction, for which I am contending, with the one exception of Jagannatha, which of course is an exception, and an exception of some weight. He is evidently contemplating a case where there has been adoption without the conjunction of any wife.

Lord Watson.—In making the adoption is it competent for the father to delegate the performance of the ceremony to one of his wives?

Mr. Jardine.—In his lifetime?

Lord Watson.—In his lifetime.

Mr. Jardine.—I should say he could not. He must receive the son himself in his lifetime.

Lord Watson.—Then the question really is whether associating one of his wives with the ceremony which he performs himself during his life, is equivalent in its effect to his directing that wife to adopt a son, to perform the ceremony herself after his death.

Mr. Jardine.—Whether it has the same legal effect,—that is the question. On that the only authority we have is that Weekly Reporter case which holds that it does have that effect.

Lord Watson.—It looks very like the difference between six and half-a-dozen. There may be a distinction: there is room for it.

Mr. Jardine.—This passage in Jagannatha is somewhat involved, and is not a very clear passage, but as far as it goes I think the tendency of it is rather against my contention,—so far as I can understand the passage. It is an attempt to reconcile what is to happen in the case of an adopted son having two sets of maternal ancestors. He finds a difficulty in conceiving this case of a boy being the son of more than one mother in the sense that her ancestry is to be reckoned as his; and he says some people would reconcile that by saying that these two lines of maternal ancestry are to be treated in some fictional way as one line, and the oblation is to be offered to them jointly as though the two lines were one line. Underlying that I think it is implying that he seems rather to have the opinion that the relationship would be an equal relationship to each of the two wives.

Lord Davey.—I do not see that there is anything in Jagannatha which is against upon—.

Mr. Jardine.—No, because he is not dealing with this case.

Lord Davey.—He deals with the possible case where a man with three wives in his lifetime adopts a child. He says what is to happen. Is the child to have three maternal grandfathers?

Mr. Jardine.—That is what he is dealing with. It is not this case at all.

Lord Davey.—It is not inconsistent with this case.

Mr. Jardine.—It is not inconsistent with what I am arguing in this case.

Lord Watson.—I know nothing about the ceremony. It has been held that where the Hindu himself adopts, and himself performs the ceremony, he receives the adoptive son into the family. But I should like to know for curiosity's sake, if for nothing else, what is meant exactly by associating one of his wives with him. Does she do anything? Does she perform any material part of the ceremony? Can he associate his three wives with him and perform the ceremony?

Mr. Jardine.—No, only one.

Mr. Mayne.—Why not? You will find nothing about it.

Mr. Jardine.—I quite agree with what my learned friend says. He says there is nothing about it. That is true. There is no obligation to associate a wife.

Lord Watson.—In that case the relation of the three wives to the adopted son would be the same.

Mr. Jardine.—It would be equal, whether it was that of stepmother, or what it was. It might be treated as the son of a deceased wife. Although it is the case legally there is no necessity for a wife to be present, I should imagine, that as a matter of practice, such a thing as an adoption taking place was almost unknown.

Sir Richard Couch.—A very unusual thing.

Mr. Jardine.—And although it is said a bachelor, an unmarried man, can adopt, I should imagine that it is a very difficult thing to begin with, to find an unmarried Hindu, and such a thing as an adoption by an unmarried Hindu, although I cannot say it would be illegal, would not be found in a generation. It is a matter of conjecture. I imagine the child to be placed on her lap. My learned friend Mr. Branson says it is the evidence in this case with regard to it. There

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is nothing laid down and prescribed in the ancient books as to her taking any part in it, or as to what part she would take at all.

Well, I do not know, my Lords, that I have anything further to say upon the matter. Your Lordships have the authorities before you. They really come to this, that Sir Francis Macnaghten's opinion was strongly in favor of my contention; and Sir William Macnaghten's opinion seems to me to be when rightly considered, also in favor of my contention.

Lord Davey.—I think so in the preface.

Mr. Jardine.—The Futwah which he quotes in the second book, so far as the opinion of the pundit is concerned, is also clearly so. I find a little difficulty in the passage in the introduction in understanding the concession that is referred to by Sir William Macnaghten, that it was conceded by some person or persons that in his lifetime he could not do this. It seems to me to be inconsistent with the other argument. I would not make the concession myself.

Lord Watson.—In that case in Sir Francis Macnaghten's report you must read his statement with reference to what occurred in the case, because his parting words, and his conclusion in the case are not very complimentary. He gives the opinions of the pundits. The case seems to have been decided upon the opinion of these pundits, and of course we must assume that there was no controversy, and that the opinions were well given.

Sir Richard Couch.—At that time it was the custom to take the opinions of the pundits.

Lord Watson.—Necessarily, one single case does not lay down the law, in the same way as a judgment of the Court.

Mr. Jardine.—Then we have the late authority, West and Bühler, on the point, which again takes the same view. I submit that on the weight of these authorities, so far as they go, they are with me in this contention, and the Judges in the Court below are to be upheld.

Lord Davey.—The text books seem to be with you.

Mr. Jardine.—Yes. Then there is the case in the 3rd Weekly Reporter, and the *obiter dictum* there is with me.

Lord Hobhouse.—That is the only direct decision of Justices Bayley and Jackson.

Mr. Jardine.—Yes. The only other work I would refer to—and I would not have referred your Lordships to it, but I notice that in the late Judgment on the only son adoption your Lordships have referred to

a work of Mr. Sircar on adoption. He is dealing with this point. I will give the reference. Your Lordships might choose to look at the work. It is the Tagore Lectures. Annapurni Nachiar v. Forbes.

Sir Richard Couch.—In the Tagore Lectures he expresses his opinion in favour of your view.

Mr. Jardine.—Yes.

Sir Richard Couch.—I looked at them.

Mr. Jardine.—Your Lordships have referred to him in the late Judgment of this Court.

Lord Hobhouse.—Yes, it is a very useful book. I shall be very glad to have the reference.

Sir Richard Couch.—I looked at it yesterday afternoon, and I found that he was evidently of that opinion.

Mr. Jardine.—He is strongly of the opinion that I am contending for, for what it is worth.

Mr. Mayne.—What is his opinion ?

Mr. Jardine.—I have not the book here.

Mr. Mayne.—Does it refer to an adoption after death or during life ?

Mr. Jardine.—Both. It is at pages 215 and 227, of the Tagore Lectures.

Lord Hobhouse.—Even Mr. Mayne's work we do not take as authority, but we find it exceedingly useful for guidance.

Mr. Branson.—My Lords, I would only ask to add a very few words, The whole object of the Hindu Lawyers in these cases of adoption, seems to have been to put the adopted son as far as possible in the position of a natural born son, that being so there is no question also that supposing this were the natural born son of one wife, the mother would inherit to that son. If then the adopted son is to be put as far as possible in the position of a natural born son, it follows that the mother who receives him in adoption, the mother who is called his mother rather than his step-mother, should be the person to inherit to him.

Lord Watson.—I do not think there is any *a priori* probability, one way or the other. It is a question of Hindu Law. I have no doubt a person thoroughly conversant in Hindu Law, which I am not, has got his own views. It does not seem unreasonable that the law might stand either way, does it ? You say the judgment does no more than assimilate the position.

Mr. Branson.—As far as possible.

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Lord Watson.—It assimilates the position to the son by a natural mother.

Mr. Branson.—That is the whole of my point.

Mr. Mayne.—The only point to which I wish to refer in a very brief reply, is as to the analogy between the result following, or assumed to have followed, from the adoption made by a single widow out of many widows under authority from her husband, and an adoption made by himself, with what is rather mysteriously referred to as being in association or in conjunction with the wife. Now, my Lords, as to the last case, although as I say I do not admit that the law is so, but I certainly feel that upon the authorities, and to a certain extent upon the recent case, I should feel considerable difficulty in arguing that the law was not as it was laid down to be in that case in the Gap number, 1864, of the Weekly Reporter, page 71, which referred to that case, and that case only. Because your Lordships will see in such a case as this that in the first place the husband authorized the widow to do a particular act. In carrying out that act she must come forward herself and take the same position in the ceremonial as he would have taken. She receives the child certainly as his delegate, but she does receive the child and nobody else in the world at that time could receive the child. Then there is the further circumstance which I think might be argued upon as very material, that although the widow has an authority to adopt she is not bound to act on that authority. Therefore when she does act on that authority she in fact exercises an independent act in bringing the boy into the world. All the father can do is to authorize her to bring an adoptive son into existence, but she then does an act by virtue of that authority which she is not compelled to do. It is a voluntary act on her part, so that it may be really the fiction of the father putting into operation a chain of circumstances which may result in an adoptive child, and her carrying out that, and doing that which brings the adoptive child as such into existence. The analogy between physiological conditions of a husband and wife is very strong. But there is no analogy whatever between that and the case here, as to which all we know is that every detail of the ceremonial being admitted to be a falsehood, all that ultimately remains of it, is that the authority was given to the first defendant who is the only person living with the husband, and that they say the adoption was made in association with him. But in that case the wife has nothing rightly to do with the matter. The child is no more and no less adopted because the adoption is made in her presence or not. If the child is after the adoption put into her lap it is no more than if it were put into the lap of the nurse maid who is selected to take charge of the

boy, who is presumably an infant, as soon as the adoption is over. Her presence adds nothing to the ceremonial. Her presence is obsolutely immaterial, and how it can be suggested that a father by having her present to do something which has no operation whatever, is by that fact taken to be evidence of such an inclination or determination of his will as shall by the mere fact that she takes part in that ceremony, after the devolution of the property from what it would otherwise be, it is very difficult to say; and upon that point there is no authority. There is no authority in such a case as the present one. The only authority there is, except as regards *dicta*, is that case in the "Gap" number of the Weekly Reporter, which refers to the case which as I have already said, is certainly almost insuperably strong, namely, the case of a widow adopting after death with her husband's authority. Annapurni Nachiar v. Forbes.

Lord Davey.—What is the finding on this question, whether the widow was associated with him.

Mr. Mayne.—It is at page 717 of the Record. Your Lordships will see at page 717 where the case begins the Court deals with the whole of the oral evidence on the point, and dismisses it. There were only the two widows your Lordships see. One was living with him, and the other had never lived with him; apparently there was some complete break off of matrimonial relations.

Lord Davey.—He tried to divorce her.

Mr. Mayne.—He tried to divorce her and failed.

Lord Hobhouse.—The divorce was pleaded in the suit;

Mr. Mayne.—Yes. My client left the Court without a stain upon her character. There was an incompatibility of disposition.

Mr. Jardine.—She never lived with him at all.

Mr. Mayne.—She was in that position in which she was a wife and indelibly a widow.

Lord Hobhouse.—That would only furnish a good reason why he should prefer the other wife if he could. But you say he could not?

Mr. Mayne.—There is really no evidence that he associated her with him. He could not have associated both of them, and he could not have associated the other.

Lord Davey.—I can quite understand the possibility of two women receiving the child.

Mr. Mayne.—There is no impossibility whatever.

Lord Davey.—Why is it said that three wives cannot jointly make an adoption?

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Mr. Mayne.—If the husband authorized all three to make an adoption I cannot see how they could make an adoption in any other way than by having the ceremonial performed as it were in triplicate.

Lord Davey.—They would all equally become mothers?

Mr. Mayne.—Yes.

Sir Richard Couch.—Could an adoption be made of one boy by three wives?

Mr. Mayne.—To the same husband?

Lord Watson.—I do not know where we should land if we were to apply the test of possibilities.

Mr. Mayne—No. It is not this case. Sir Francis Macnaghten assumes that it is an impossibility, and in that case they referred it to the Master. It seems to me a very curious proceeding.

Sir Richard Couch.—There are authorities where adoption can be made, as it can in some cases, without any authority from the husband supposing there are two widows, the adoption is made by one of them by the senior widow.

Mr. Mayne.—That is in Bombay, no doubt.

Lord Davey.—Sir Francis Macnaghten says it is an impossibility.

Mr. Mayne.—That all applies to the case of adoption by widows after the death, when they are the operative people in the ceremony. But there is no reason whatever why a man who had ten wives should not associate them all, have them all sit in a row.

Lord Hobhouse.—It seems to me that one is chosen to receive.

Mr. Mayne.—In the case of a posthumous adoption after the husband's death. I am talking of the present case, the adoption by the husband.

Sir Richard Couch.—I do not know that that would be any reason. If he had three or four wives would there be anything to prohibit him from having them all as spectators of what he was doing? I do not suppose such a thing was ever done.

Mr. Mayne.—In a man's lifetime?

Sir Richard Couch.—Yes, I do not suppose he would ever have all his wives present as spectators at the adoption.

Mr. Mayne.—Generally I should imagine the wives would be behind the purda, in a high class family.

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Lord Hobhouse.—Nothing seems more reasonable than that a man should be allowed to consult the peace of his family by putting one of his wives more into the position of a natural mother than the others? And if you cannot find any authority or principle against it, why should not it prevail? The only authorities you find against it in principle prove a great deal too much, because they are those which say that the moment the man has a child all his wives are the mothers of that child while we all know for this purpose they are not.

Sir Richard Couch.—It seems to have been a sort of expression used to indicate something, but not to indicate that they have rights of inheritance.

Lord Hobhouse.—It is something in the next world, and not in this.

Lord Watson.—According to the Hindu ceremonial, only one person can perform the office of receiving the child.

Mr. Mayne.—Yes. The original Court certainly—and Mr. Justice Best less distinctly—seemed to think that it is essential that the mother should be present, and that the mother should receive, and that the ceremony cannot go on without it. That is a mistake. There is no foundation whatever for it.

Sir Richard Couch.—Who was the District Judge?

Mr. Jardine.—Mr. Hamnett.

Their Lordships' Judgment was delivered by *Lord Hobhouse* :—This suit is in form instituted by the Court of Wards; in substance it is one between the two widows of Irudalaya, late owner of the impartible estate of Uthumalai, who have interpleaded one another. They were both married on the same day; but it has been found that the appellant is the senior wife of the two. On the 12th July, 1891, Irudalaya adopted a boy called Navaneetha: on the 12th August, 1891, he died; and on the 16th November, 1891, the boy died being then about two years old. The Court of Wards was then in possession of the estate as his guardian, and their only interest is to ascertain his heir.

The appellant's claim is rested on the fact that she was the senior wife; the respondent Menakshi's on the fact, which has been found by both Courts, that the boy was adopted by Irudalaya in conjunction with her and not in conjunction with the appellant. The District Judge held that the respondent was entitled to the estate as adoptive mother and nearest heir of the last holder Nava-

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neetha, and his judgment was affirmed by the High Court. That opinion is challenged in the present appeal. There has been a great deal of dispute in the Courts below upon matters of fact, but none are in dispute now. The disputed question of law is thus stated by the District Judge; "Whether, when a man having "more than one wife, adopts a son in conjunction with one of them "only, the other wives acquire the same legal status with respect "to the adopted son as the wife who joins her husband in making "the adoption?"

There is only one reported decision directly involving the proposition in question. It is to be found at p. 71 of the supplementary volume of the "Calcutta Weekly Reporter" for the year 1864. The plaintiff Kasheeshuree was the first wife of Kali Kant. His second wife was called Mohinee. Kali Kant adopted a boy in conjunction with Mohinee and without the concurrence of the plaintiff. After the deaths of Kali Kant and of Mohinee and of the boy, the question arose whether the heir of the boy was the plaintiff, or the defendant who was Kali Kant's nephew and nearest collateral. It was argued for the plaintiff that both wives were equally adoptive mothers, and both entitled to inherit in preference to a collateral. The Court (consisting of *Bayley* and *Louis Jackson* J.J.) stated their opinion that this position was not borne out by Hindu Law and precedent; and after subjecting the cited authorities to examination, they decided in favour of the defendant. So that according to those experienced Judges, when a man has selected one of his wives to adopt a boy in conjunction with him, other wives who do not participate in the act are so completely excluded from inheritance to the boy, that a collateral member of the family shall be preferred to them. That the other wives should be postponed to the one who joined in making the adoption is a less sweeping conclusion, but clearly involved in the wider one reached by the Bengal High Court.

Mr. Mayne has contended for the appellant that this Bengal decision is not warranted by law. He referred to sacred texts of Rishis, Manu and Baudhayana, for some fundamental principles of adoption, and to show that the good effects produced by the son of one wife enure to the benefit of other wives of the same man. But these texts are very far from showing that a wife who receives in

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adoption, and another who does not, stand on an equal footing as regards inheritance to the adopted boy. If applied to inheritance in the way contended for by the appellant such texts would prove too much; they would be equally good to prove that a natural mother and her co-wife stand on an equal footing, which is clearly not the case. There is no advantage to be got from more minute criticism of these texts, nor indeed of the texts cited from the later books, Dattaka Chandrika and Dattaka Mimansa, which are addressed to the question whether a wife's assent is necessary to an adoption, and not to this question of inheritance.

A passage is quoted from Colebrooke's translation of Jagannatha (Digest, Vol. III., pp. 252-3) in which the author considers the difficulty (seeming difficulty he calls it) occurring in oblations of funeral cakes to a maternal grandfather, either when the offerer has none from having been adopted by an unmarried man, or when he has more than one from having been adopted by a man with more than one wife. Both the difficulty and the plan suggested for meeting it are very abstruse, and so far as their Lordships can see, of a very formal nature; but the whole discussion clearly has reference to the religious aspect of the situation.

The authority most relied on for the appellant is a passage in the Preliminary Remarks of Sir William Macnaghten in his work on Hindu Law. It is rather curious that he approaches the question by way of illustrating his opinion that the Hindu Law is generally simple and free from difficulty. He supposes a case. A man dies childless leaving three widows. He gives permission to one to adopt a son. The adopted son dies without issue leaving the three widows surviving. To whom will the property go, to the widow adopting, or equally to the three? The law, he says, is silent. He then supposes an advocate of the adopting widow to admit that, if the husband had adopted, he could not have selected one of his wives as adopting mother and excluded the others from all maternal relation, but to contend that in the case stated the non-adopting widows were only step-mothers. He continues "The "reason is plausible but such is not the law. The three widows "are one and the same individual. The adopter has the privilege "of selecting the boy; but adoption once made, he necessarily

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"holds the same relation to all of them." This passage certainly gives the appellant a right to argue not only that the admission which Sir William puts into the mouth of the adopting widow's supposed advocate was deemed by him to be good law but that he goes further and applies to the subject of inheritance the doctrine of Manu that all wives have male issue when one has it. This passage in Sir William Macnaghten's preface is apparently the only authority in favour of the appellant. It must be taken with the respect due to his great reputation, but also with the drawback that he was avowedly giving his opinion on a hypothetical case of the first impression. He has no precise authority; the law, he says, is silent: he does not shew by what process he arrived at his conclusion: and that which seemed to him so clear that it illustrated the perspicuity of the Hindu law has met with doubt and denial from others.

In fact Sir W. Macnaghten himself goes on (pp. 12, 13, of his Preface) to make statements very difficult to reconcile with those which have just been quoted. He is speaking of a case in which a man leaving three widows has appointed one to make adoption:—"I here merely allude to the rights and privileges "accruing to the single widow from the simple fact of her having "made the adoption, independently of any intention expressed or "implied by the deceased that such widow alone should be con- "sidered as the mother of the adopted child. If he declared this "explicitly the case would be different; or if such may be reasonably "gathered to have been his intention from some unequivocal indica- "tion of his will that his other wives should have no concern with "the adoption. But the simple fact of his having commissioned "any one of the three to select the boy cannot be considered as "sufficient to deprive the two others of their maternal rights or to "debar them from taking the shares to which they would have suc- "ceeded had no adoption taken place." If both these passages are sound law we have as the result that a man may by a posthumous act give a preference to one wife which he cannot do when living.

Sir F. Macnaghten in p. 171 of his Treatise speaks of the adoption of a boy to a man who left three widows, with directions for joint adoption about which they could not agree. The Court

selected a boy and then the question was which widow had the right to receive him? "The law is clear and was undisputed. "The boy could not be received by the three widows jointly. He "must be received by one of them—and would then be considered "as the son of the father and of the widow by whom he had been "received—about this there was not, because there could not be, "any dispute." Annapurni Nachiar v. Forbes.

In the Appendix of the same work p. x. occur the answers of a Pandit examined by the Court in the same case. Among those answers occur the following:—" Only one (widow) can adopt; the "three (widows) may agree upon the child to be adopted, but only "one of the widows can adopt." "The child becomes the child of "all three. The widow adopting him, if he should die under age, "she will be called the mother and the others the step-mothers."

The actual decision, which was in favour of the senior wife, throws no further light on the question now before the Board. But here are opinions given on an actual case under judicial decision, and they are to the effect that the adopting widow would become the mother of the boy in a sense in which her co-wives would not be mothers, in effect that she would be in the place of a natural mother, which would lead to the conclusion that she was the boy's heir. Those opinions related to a case in which, so far as any action of their husband was concerned, the widows stood on an equality, and became unequal only by the ceremony of adoption after his death.

More recent text-books referring to the Bengal decision of 1864 have been cited to their Lordships, such as West and Bühler, 3rd edition, pp. 1181, 1182, and Golap Chandra on Adoption, Tagore Law Lectures for 1888, p. 153, and they were referred to by the learned Judges in the Courts below. They do not show that any dissatisfaction with that decision has been felt by Indian lawyers, but on the contrary state the law in accordance with it.

It seems to their Lordships that the decisions in the Bengal case and in this case accord with principles well recognized as applicable to other points of Hindu law. Reference has been made to the text of Manu (Book IX., Sloka 183) in which he declares that if of several wives one brings forth a male child, all shall by means

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of that child be mothers of male issue. In the preceding Sloka he declares that if among several brothers of the whole blood one have a son born they are all made fathers of a male child by means of that son. We must suppose that all take the spiritual benefits of male issue; but the law is clear that for the purposes of inheritance the natural mothers and fathers respectively are preferred. Again it seems not to be doubted that a man may authorize a single one of several wives to adopt after his death, or that she would on adoption stand in the place of the natural mother. If he can do that, it would be very capricious to deny him the power of selecting a single wife to join with him in his lifetime in adopting a boy, with the same effect on her relations with that boy. It is true that some rules of Hindu law, resting perhaps on religious tenets or ancient customs, appear to be quite arbitrary; but when this Board is asked to affirm a rule of that nature they require some cogent authority for it. It certainly is a reasonable law that the head of a family should be able to take action likely to prevent disputes between his widows relative to adoption and the consequences of it. To unite one wife with himself in adopting is one way, and it is satisfactory to find that besides the one direct judicial decision there is so much reason and opinion in its favour and so little against it. They hold that the High Court of Bengal in 1864 and the Madras Courts in this case have decided rightly, and they will humbly advise Her Majesty to dismiss this appeal. The appellant must pay the costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Moore.

Nallamuthu Pillai ... ... Appellant * (*Defendant*).

v.

Betha Naicken ... ... Respondent (*Plaintiff.*)

Nallamuthu Pillay v. Betha Naicken.

Limitation—Sale of property by unregistered deed—Subsequent registered mortgage —Vendee's possession for more than 12 years—Registration Act, S. 50.

By an unregistered deed, dated the 2nd October 1876, V. P., sold a certain property to B. N. Subsequently in June 1878 he mortgaged the same property to V. C.

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* S. A., No. 1310 of 1898. 11th April 1899.

by a registered deed of mortgage. V. C. obtained a decree on the mortgage and assigned it to the defendant who purchased the property in execution of the decree. B. N. who was in possession of the property under the sale of 1876 was not made a party to any of these proceedings. He now brought this suit for a declaration of his title, which was resisted on the ground that the title of the defendant which ultimately depended upon a registered instrument had priority over the unregistered sale-deed, under S. 50 of the Registration Act:— Nellamuthu Pillay v. Betha Naicken.

Held that S. 50 of the Registration Act which provided for the priority of a subsequent registered over an anterior unregistered instrument, could not in the absence of any specific provision to that effect, affect the law of limitation; that the hypothecation right upon which the defendant depended for his title could not avail against the plaintiff who had by undisturbed possession for more than the statutory period, acquired an indefeasible right to the property and that the plaintiff was entitled to the declaration claimed by him.

Second appeal from the decrees of the District Court of Trichinopoly in A. S. Nos. 155 and 156 of 1896 presented against the decrees of the Court of the District Munsif of Kulitalai in O. S. Nos. 878 and 879 of 1894.

The facts appear from the judgment of *Subrahmania Aiyar*, J.

V. *Krishnaswami Aiyar* for appellant.

T. P. Kothandarama Aiyar, and *A. D. Zaccheus* for respondent.

The Court delivered the following Judgments :—*Subrahmania Aiyar, J.* :—This is a suit for the declaration of the plaintiff's right to the land in dispute which was purchased by him for Rs. 95 from the admitted original owner one Vadamalainatha Pillai, under an unregistered instrument, dated the 2nd October 1876, but which having been included among the properties hypothecated to one Virappa Chetti by the said Vadamalainatha Pillai under a registered instrument of June 1878, was sold in execution of the decree obtained on the hypothecation by Virappa Chetti and assigned to the defendant, and at such sale was purchased by the defendant himself. The plaintiff who has been in possession of the land ever since his purchase was not, however, made a party to the said litigation.

The lower Courts granted the declaration prayed for; the decision of the lower appellate Court being based on the ground that though Virappa Chetti was, at the time he took the hypothecation, aware neither of the sale of the disputed land to the plaintiff

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nor of the latter's possession thereof, yet he, Virappa Chetti, had omitted to make due enquiry from his mortgagor about the matter of the possession of the land, that consequently he should be held to be in the position of one who had taken the hypothecation with notice of the sale to the plaintiff and that the defendant, the Chetti's assignee cannot, therefore, set up the hypothecation as against the plaintiff.

It was contended before us on behalf of the defendant that even if Virappa Chetti had omitted to make due enquiry, as supposed by the lower appellate Court, that does not preclude the defendant from relying on the hypothecation as against the plaintiff since nothing short of actual, clear and distinct notice of a prior unregistered transfer should be held to affect the right given by S. 50 of the Registration Act, to a person claiming under a registered instrument as against a prior transferee under an unregistered instrument. It is not, however, necessary to enter into a consideration of this contention inasmuch as it appears from the hypothecation instrument itself, the provisions whereof as to the matter under discussion the District Judge apparently overlooked, that Virappa Chetti did not omit to make the enquiry which the Judge thought it was his duty to make and that the Chetti was misled by Vadamalainatha's untrue representation that the possession of the land was with himself.

Though, therefore, the decision in favour of the plaintiff, cannot be supported on the ground suggested by the District Judge, yet it is clearly sustainable on the ground that, by virtue of the plaintiff's possession of the land for over 12 years prior to the institution of the present suit, the hypothecation in question has, in so far as the disputed land is concerned, been defeated. The contention of the learned Vakil for the defendant if he was rightly understood, that *hypothecation* right is not a species of right liable to be affected by prescription such as that established in this case is unsupported by authority and opposed to principle. There can be no doubt that such a right is liable to be affected not only by lapse of time as between the creditor and the debtor but also by possession of the hypothecated property, held for the required period by a third person on a claim inconsistent with the rights of both the creditor

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and the debtor. In support of this proposition reference may, in the absence of decided cases on the point, be made to the Roman Law which fully recognized that prescription like that established in the present instance had the effect of extinguishing even a hypothecation right, as appears from, among other authorities, the following passage of the Code. "Long standing silence, supported by regular limitation, renders nugatory the action for creditors taking proceedings for their pledge, unless the debtors, or those who have entered into their rights command possession of the security." (Salkowski's Roman Law by Whitefield, 503. See also Mackeldey's Roman Law by Dropsie, 267; Hunter's Roman Law, 2nd Edition, 447).

The learned Vakil for the defendant next contended that taking the rule applicable to cases where the mortgagor has under the general law a right to hypothecate the property given as security, to be as stated above, still such rule should not be extended to a case like this where a person not having, under the ordinary law, any right to the property of which he makes a transfer, is nevertheless enabled by the special provisions of S. 50 of the Registration Act to make a valid transfer of such property by means of a registered instrument.

That section, however, so far as we are now concerned, confines itself to the simple case of competition between a right created by an instrument that is registered and a right created by an instrument that is not registered. And neither the Registration Law nor any other enactment in force in this country contains a provision analogous to S. 21 of the English Land Transfer Act of 1875 which lays down that "a title to any land, adverse to, or in derogation of the title of the registered proprietor, shall not be acquired by any length of possession." The import of the words just quoted, does not appear to have been judicially explained. But in Lightwood on Possession, it is suggested that that provision does nothing more than prohibit the entering of an adverse title on the register. (See pp. 303 and 304).

Be this as it may, in the absence of any enactment to support the argument put forward on behalf of the defendant there is

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. S. Subrahmaniya Aiyar, Officiating Chief Justice, and Mr. Justice O' Farrell.

Behara Gowrachandra ... ... Appellant* (*Defendant.*)

v.

Vikrama Maharaja Deo ... ... Respondent (*Plaintiff.*)

Behara Gowrachandra *v.* Vikrama Maharaja Deo.

Agent's Court—Suits of the value of less than five thousand—Jurisdiction—Practice.

Though there is no provision in respect of Agent's Courts similar to S. 12 of the Madras Civil Courts Act, the Agent's Court is one of unlimited jurisdiction and can entertain a suit of the value of less than five thousand rupees which is primarily cognisable by the Divisional Assistant.

But in a case where the suit which can be entertained by the Divisional Assistant has been improperly instituted before the Agent, the Court may refuse costs since thereby the unsuccessful party is put to the trouble of a costly appeal to the High Court or the Governor in Council.

Appeal from the decree of the Court of the Agent to the Governor at Vizagapatam in O. S. No. 6 of 1897.

C. Ramachandra Rao Saheb and *P. Nagabhushnam* for appellant.

V. Bhashyam Aiyangar and *C. R. Tiruvenkata Chariar* for respondent.

The Court delivered the following

JUDGMENT:—The learned Vakil for the appellant does not desire to argue the appeal on the merits, and the only point which he presses is the question of jurisdiction. No doubt, the Agency rules provide that suits exceeding Rs. 5,000 in value shall be instituted in the court of the Agent, and, therefore, by implication, that suits below that value and not cognizable by a Munsif shall be instituted in the court of the Divisional Assistant. There is, however, nothing equivalent to the positive direction in S. 15 of the Civil Procedure Code that "Every suit shall be instituted in the court of lowest grade competent to try it." Even that provision has been held to be a rule of procedure and not of jurisdiction; a direction to the suitor and not an absolute rule binding the court. (See *Nidhi*

* A. No. 209 of 1898. 6th September 1899.

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Lal v. *Mazhar Husain*, I. L. R., 7 A., 230; *Matra Mondal* v. *Hari Mohun Mullick*, I. L. R., 17 C., 155; *Krishnasami* v. *Kanaka Sabai*, I. L. R., 4 M., 183; *Augustine* v. *Medlycott*, I. L. R., 15 M., 241. We think these decisions are sound and we doubt the correctness of the decision in *Velayudan* v. *Arunachala*, I. L. R., 13 M., 273). We do not see why the same principles should not be applied in the case of the Agent and his Divisional Assistant whose respective positions are analogous to those of District and Subordinate Judges. The Agent has power under rule XIX to remove to his own or any other court in the jurisdiction any suit which may be depending in a lower Court from which it would appear that his jurisdiction extended to all suits of whatever value within the Agency. Although, therefore, there is no provision in the Agency rules equivalent to S. 12 of the Civil Courts Act (III of 1876) which expressly provides that the jurisdiction of a District Judge extends to all original suits and proceedings of a civil nature, we think it is fairly inferrible from the wording of the rules that the Agent has jurisdiction over all suits of a civil nature arising in the Agency and that the rule regarding the institution of suits of a lesser preliminary value than Rs. 5,000 in the Divisional Assistant's court is, like the analogous rule contained in S. 15, C. P. C., one of procedure and not of jurisdiction. We must not, however, be understood as implying that the rule may be disregarded with impunity. Recourse to the Agent's court rather than that of the Divisional Assistant throws upon the unsuccessful party the burden of an appeal to the High Court or the Governor in Council, and may be a good ground for refusing the costs of a successful respondent who has unnecessarily sued in the higher court. In the present case, however, we understand there were good reasons why the suit should have been heard by the Agent, and the appellant does not contest the correctness of the decision on the merits.

We therefore dismiss the appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Moore and Mr. Justice Michell.

Collector of Trichinopoly ... ... Appellant* (*Petitioner*).

v.

Sivaramakrishna Sastriar ... ... Respondent (*Counter-Petitioner.*

Civil Procedure Code, Ss. 2, 244, 412, 540, 622—Suit by minor in *forma pauperis*— Order directing next friend to pay court-fees—Collector's application to execute dismissed—Appeal—Revision. Collector of Trichinopoly *v* Sivaramakrishna Sastriar.

Where on the dismissal of a suit by a minor in *forma pauperis*, the next friend was directed by the decree of the Court to pay the court-fees due to the Government and the application of the Collector to execute the decree against the estate of the next friend was dismissed on the ground that on his death his estate had passed to his son by survivorship unaffected by the decree :—

Held on appeal by the Collector, that he was not a party to the suit and could not avail himself of the provisions of Ss. 2, 244 and 540 and that, therefore, no appeal lay against an order disallowing his application to execute the decree.

Collector of Ratnagiri v. *Janardan Vithal Kamat*, I. L. R., 6 B., 590, *Collector of Canara* v. *Rambhat*, I. L. R., 18 B., 454 and *Collector of Vizagapatam* v. *Abdul Karim Saheb*, I. L. R., 21 M., 113 approved and followed. *Secretary of State* v. *Bhagwanti Bibi*, I. L. R., 13 A., 326, dissented from ; *Janki* v. *Collector of Allahabad*, I. L. R., 9 A., 64, *Ramdial* v. *Ramdass*, I. L. R., 1 A., 181 (F.B.), *Amir Baksh Sahib* v. *Vencatachala Mudali*, I. L. R., 18 M., 439, *Baij Nath Sahai* v. *Mohes Narain Singh*, I. L. R., 16 C., 535 and *Sheik Suleman* v. *Shivram*, I. L. R., 12 B., 71 discussed.] ;

Held that the next friend of the minor could not (at least in respect of an order under S. 412) be considered to be a party to the suit within the meaning of S. 244 and that on this ground also the order was not appealable.

Held also that as no question of jurisdiction was involved, the Court could not exercise its powers of revision under S. 622 of the Code of Civil Procedure.

Appeal from the Order of the District Court of Trichinopoly on E. P. No. 3 of 1898 in O. S. No. 32 of 1894.

N. Subrahmanyam for *Acting Government Pleader* for appellant.

V. Krishnaswami Aiyar for respondent.

The Court delivered the following

JUDGMENTS :—*Michell J.* :—This is an appeal by the Collector of Trichinopoly against an order of the District Court dismissing the appellant's application for issue of a sale proclamation under S. 287 of the Civil Procedure Code in respect

* A. A. O. No. 122 of 1898. 14th August 1899.

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of certain properties which had been attached upon a previous application made by him, and for sale thereof and payment to him from the sale-proceeds of the amount of certain stamp duty ordered by the decree in Suit No. 33 of 1894 on the file of that Court to be paid to the Government, and of the costs of the two execution applications. That suit was brought by certain minors by their next friend, the respondent's father, in *forma pauperis.* The suit was dismissed, and by an order contained in the decree, the respondent's father, as the next friend of the plaintiffs was ordered to pay the sum of Rs. 315, being the stamp duty which would have been payable by the plaintiffs if they had not been allowed to sue as paupers. The respondent's father died while the attachment of his properties, effected on the appellant's former application, was subsisting, and the application, against the order passed on which the present appeal was preferred, was made against the respondent as the son and legal representative of such next friend, and was heard and decided on the merits and was dismissed by the Acting District Judge on the ground that the properties passed to the respondent on his father's death by survivorship unaffected by the attachment as well as the decree.

A preliminary objection is raised to this appeal, that the order appealed against is not appealable, because the appellant, the Collector, was not a party to the suit in which the decree, by which the respondent's father was ordered to pay the Court-fees, was passed and also because the respondent's father, as the next friend of the minor plaintiffs in the suit, was not such party, and therefore S. 244, Sub-Section (*c*), of the Code, on which together with the definition of "decree" in S. 2 and S. 540, the appellant relies as giving him a right of appeal, does not, it is contended, apply to this case.

In support of the first of these grounds of preliminary objection to this appeal, two decisions of the High Court of Bombay are relied on. In *Collector of Ratnagiri* v. *Janardan Vithal Kamat,* I. L. R., 6 B., 590, it appears that the plaintiff was allowed under S. 409 to sue in *forma pauperis,* but the Court finding that it had no jurisdiction to try the suit, returned the plaint for its being presented in the Court having jurisdiction, and ordered the plaintiff to pay the Court-fees from payment of

which he had been exempted on the ground of pauperism. That order must have been an order purporting to have been made under S. 412. The Collector applied to the Court which passed that order for its execution. The application was rejected, and on appeal to the District Judge, the order of rejection was upheld. On second appeal by the Collector to the High Court, it was held that no appeal lay against the original order refusing execution of the order for payment of Court-fees, and, therefore, no second appeal lay because the question was "one arising not between the parties to the suit [Clause (c), S. 244 of Act X of 1877], but between the Collector who is a third party and one of the parties to the suit." This decision was expressly approved and followed in *Collector of Canara* v. *Rambhat*, I. L. R., 18 B., 454, in which it was held that no appeal by Government lies in respect of the question as to the right of Government to recover the Court-fees from the plaintiff who has failed in a suit brought by him in *forma pauperis*. The respondent's Vakil also relied on *Collector of Vizagapatam* v. *Abdul Karim Saheb*, I. L. R., 21 M., 113, in which this Court entertained a revision petition under S. 622, in a case in which a District Judge had refused to order the plaintiff, whose suit brought in *forma pauperis* had been dismissed by him without contest, to pay the Court-fees. This decision was relied on as showing that no appeal lies in such a case, because, if an appeal lay, the High Court could not have dealt with the case under S. 622. On the other hand, the appellant's counsel relies on the decision in the *Secretary of State* v. *Bhagwanti Bibi*, I. L. R., 13 A., 326, in which case a District Judge, having in a suit brought in *forma pauperis* decreed the plaintiff's claim in part and dismissed it in part but having omitted to order, under S. 412, payment by the plaintiff of the Court-fee on the part of the claim which was dismissed, an appeal by the Government for recovery of such Court-fees was held to lie. The learned Judges in that case referred to and followed the case of *Janki* v. *The Collector of Allahabad*, I. L. R., 9 A., 64, wherein it had been held that in an application by the Collector for execution of an order for payment of Court-fees passed under S. 411 of the Code, the Collector must be deemed to be a "party to the suit in which the decree was passed" within the meaning of S. 244, sub-section (c), and that an order passed on such application was therefore appealable. It is to be observed,

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however, that while in S. 411 it is expressly provided that the Court-fees from payments of which the successful pauper plaintiff was in the first instance exempted shall (besides being a first charge on the subject matter of the suit) be recoverable by the Government from the party ordered by the decree to pay them in the same manner as costs of suit are recoverable under the Code, S. 412 contains no such provision for recovery by Government of Court-fees ordered under that section to be paid by a pauper plaintiff. Arguments, therefore, in favor of the Government being deemed "a party to the suit" based on the special provision in S. 411 which places the Government in respect of the Court-fees decreed to be paid, in the same position as a party to the suit in regard to execution of a decree, cannot, it appears to me, be applied to a case falling under S. 412 without ignoring the fact that the Legislature has enacted no such provision in the latter section. The appellant's counsel also relies on the decisions in *Ram Dial* v. *Ram Das*, I. L. R., 1 A., 181 (a Full Bench Case); *Amir Baksh Sahib* v. *Venkatachala Mudelly*, I. L. R., 18 M., 439; *Baijnath Sahai* v. *Mohes Narain Singh*, I. L. R., 16 C., 535, and *Sheik Suleman* v. *Shivram Bhikali*, I. L. R., 12 B., 71, as showing by way of analogy, that an appeal ought to be held to lie in such a case as the present. In the first three of these cases the question was whether a defaulting purchaser at an auction sale was, with reference respectively to S. 293 of the Code of 1882 and S. 254 of the Code of 1859, which was substantially the same as S. 293 of the Code of 1882, a party to the suit within the meaning of S. 244 of the Code of 1882, and S. 11 of Act XXIII of 1861, respectively, so as to render orders passed in such cases appealable, and the question was in all these three cases decided in the affirmative. In the case reported in I. L. R., 12 B., 71, it was held that a surety for the performance of a decree against whom an application for execution has been made, under S. 253 of the Code, has a right of appeal, as if he was a party to the suit, against an order passed on such an application. But the sections to which all these cases related expressly provide that execution proceedings may be taken against, in the one case, the defaulting purchaser, in the other case the surety, in the same manner as they may be taken in execution of a decree, thus placing the defaulting purchaser and the surety respectively in virtually the same position as a judgment-debtor, just as S. 411 contains a

similar provision placing the Government in the position (for the purpose of recovering Court-fees) of a decree-holder; and the decisions in these cases turned mainly upon the effect of those provisions in the respective sections of the Code above mentioned. Whatever may be the value of those decisions as authorities bearing upon a case falling under S. 411, they are not, I think, authorities bearing upon a case such as the present, under S. 412 which contains no such provision. For the reasons given, I am of opinion, agreeing with the Bombay decision in I. L. R., 6 B., 590, 18 B., 454, that the Collector is not "a party to the suit in which the decree was passed" within the meaning of S. 244 (*c*) of the Code and that therefore, he had no right of appeal in this case.

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With reference to the other preliminary ground of objection taken, *viz.*, that the next friend of the plaintiff is not a party to the suit and therefore the proceedings in question in this case do not involve any question falling within S. 244 (*c*), and no appeal lay, *prima facie* a next friend is not a party to the suit. The appellant's counsel, however, relied on the provision in S. 440 that the next friend "may be ordered to pay any costs in the suit as if he were the plaintiff." But that provision relates only to costs, and Court-fees, though as between the plaintiff and the defendant they are costs, are not costs as between the plaintiff and the Government, but revenue. S. 440, therefore, does not in my opinion, apply to a case of an order passed under S. 412. It is true S. 411 makes the amount of the unpaid Court-fees ordered by the decree to be paid to any party to the suit, recoverable by the Government in the same manner as costs of suit are recoverable under the Code, but in the first place the present case does not fall under that section, and in the second place that section does not say that these Court-fees are to be deemed to be costs in the suit, but that they shall be recoverable in the same manner as costs of the suit are recoverable. I am, therefore, of opinion that at all events, in such proceedings as those with which we are concerned in the present case, which relate to the enforcement of an order under S. 412 which directed payment of Court-fees by a next friend, the next friend cannot be considered to be a party to the suit, and that consequently on this ground also it must be held that no appeal lies in the present case.

This appeal should, therefore, in my opinion, be dismissed with costs.

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Nor is this a case which we can deal with under S. 622 of the Code, because the order appealed against dismisses the Collector's application upon grounds of law and no question of jurisdiction is involved.

Moore J.—I concur.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. S. Subrahmania Aiyar, Officiating Chief Justice, and Mr. Justice O'Farrell.

Hajee Ismail Sait ... ... Appellant *(*Plaintiff*).

v.

The Trustees of the Harbour of Madras. Respondents (*Defendants*).

Hajee Ismail Suit *v.* The Trustees of the Harbour of Madras.

Cause of Action—Harbour Trust Board—Extension of the Harbour—Injury to Plaintiff's land—Action for damages.

Where the harbour constructed by the Madras Government and handed over to a Trust Board under Act II. of 1886, was subsequently extended by the Board under the powers given to them by the Act and the plaintiff brought a suit to recover damages for injury caused to him by the encroachment of the sea on the ground that the Board was bound to, but did not, maintain and keep in good repair a revetment or sea-wall so as to protect the plaintiff's property from harm:—

Held, affirming the judgment of *Shephard* J that the plaintiff had not shown any valid cause of action against the Board.

Per Subrahmania Aiyar, J:—The erection of the harbour wall was not *per se* a nuisance. The Government and the Board had but used their property, *viz.*, the foreshore, in a natural manner and without any negligence and were not liable to the plaintiff for the damage done to him. Maybe they could have prevented the injury by maintaining a revetment but they were under no legal duty to do so. Even if there was a duty to maintain a revetment, the statute gave them no power to spend any money on constructions not required for the purposes of the harbour; the Act, therefore, conferred upon them the right to maintain and improve the harbour, notwithstanding that it might be a nuisance and cause loss to other persons.

Per O'Farrell J:—The user of the foreshore for the construction of a harbour could not be said to be a natural user of it within the meaning of the decided cases. As held by *Blackburn* J. in *Geddis* v. *Bann Reservoir Proprietors*, 3 A. C., 430, no action lay to recover damages caused by the exercise of statutory powers without negligence, but statutory powers could not be said to be exercised without negligence, if, by the exercise of powers given by the statute or common law, the damage could have been averted. If the Board by *reasonable* expense in maintaining a revetment, could have prevented the injury to the plaintiff, they were bound to do so. And if they were

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* A. No. 5 of 1899. 23rd August 1899.

so bound, it could not be said that the right, given to the Trustees of expending money, "for the purposes of the Act" did not include the maintenance of a revetment to protect others from harm.

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Appeal from the decree of the High Court of Judicature in the exercise of its Ordinary Original Civil Jurisdiction made in Civil Suit No. 105 of 1898.

The facts appear from the judgment of *O'Farrell*, J.

The Advocate-General (C. Arnold White), E. Norton, K. Brown, and *R. F. Grant*, for appellant.

J. H. M. Ryan, Allan Daly and *R. A. Nelson* for respondents.

The Court delivered the following

JUDGMENTS :—*The Officiating Chief Justice* :—This case comes up for decision on the pleadings. Now, putting aside vague general expressions which occur in the plaint and the written statement filed on behalf of the plaintiff and taking the definite allegations therein, the plaintiff's case is that the Harbour Trust Board, in maintaining and extending the northern wall of the harbour without providing a revetment or sea-wall sufficient to protect the plaintiff's property from being encroached upon by the sea, has committed an actionable wrong and is responsible to the plaintiff for the damages sustained by his buildings having been undermined and destroyed by the sea.

In arguing on his behalf the learned Advocate-General contended that the wall as it stood when constructed by the Government and as subsequently extended by the Board was and is a nuisance to the plaintiff and relied strongly on the maxim *sic utere tuo ut alienum non lædas*. Now, though that maxim is an oft-quoted one, yet it is obvious that only in cases where the relative rights of owners of two different landed properties are clear with reference to specific rules of law and one of those properties has been used in a manner inconsistent with such rules, the maxim can be safely employed as indicating that the law has been broken. Where such is not the case, however, the maxim furnishes no certain guide for the solution of the question whether the user of one of the two properties to which user objection is taken, does or does not amount to an actionable wrong. See per *Erle*, C. J. in L. R., 2 Q. B. 247 who there points out that the maxim is no help to decision as it

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cannot be applied till the decision is made. And the fallacy of characterising a work like the wall in question as a nuisance, is shown by the passage which follows that just quoted, where the Chief Justice, referring to the act complained of in that instance, observes that the term nuisance means "both annoyance that is actionable, and also that which is not actionable; and where the question is, whether an annoyance is actionable, the word 'nuisance' introduces an equivocation which is fatal to any hope of a clear settlement."

It is therefore necessary to enquire whether any right of the plaintiff has been infringed. The plaintiff does not allege that the building of a wall such as the one in question is *per se* a nuisance. Indeed, it is difficult to see how such an allegation can be sustained, for the building of a harbour and such like is only a natural mode of using the property near the foreshore. (Moore's History of the Foreshore, page 660). See as to the Crown's prerogative to establish ports, &c. Bacon's abridgment: 7th Edition, Volume VI, page 402, and 13 Appeal Cases at pages 722-23. Nor is it alleged that the harbour wall itself has been negligently constructed. Under the circumstances the mere fact that damage has been caused by the wall is not decisive of the question whether any right of the plaintiff has been infringed. See *West Cumberland Iron and Steel Company* v. *Kenyon*, where Lord Esher (then Brett, Lord Justice) expressed himself on the point thus: "The action is brought on the ground of an alleged breach of the maxim *sic utere tuo ut alienum non lædas.* The cases have decided that where the maxim is applied to landed property, it is subject to a certain modification, it being necessary for the plaintiff to show not only that he has sustained damage, but that the defendant has caused it by going beyond what is necessary in order to enable him to have the natural use of his own land. If the plaintiff only shows that his own land is damaged by the defendant's using his land in the natural manner, he cannot succeed." (11 Ch. Dn. at pages 787-8). See also *Wilson* v. *Waddell* (2 App. Cas. 95) where Lord *Blackburn* observes "The general rule of law in both countries is that the owner of one piece of land has a right to use it in the natural course of user; unless in so doing he interferes with some right created either by law or contract." (*Ibid*, p. 99).

Having thus seen that the plaintiff has not shown that the Board or the Government has been using their property in any but a natural manner unattended by negligence in the construction of the wall

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itself, the question arises whether there was any negligence on their part in omitting to provide and maintain such a revetment or sea-wall as would have protected the plaintiff's property from destruction by the sea. In other words, were they under a duty to construct such work in the interests of the plaintiff though not required for the purposes of the harbour. No authority was cited for the view that the Government or the Board owed any such duty to the plaintiff. Of the decisions cited on his behalf as establishing the liability of the defendants, none seems to touch the present case. No doubt one of them, *Geddis* v. *Bann Reservoir Proprietors* (3 App. Cas., 430) at first sight appears to be very similar to the present case and the observations of Lord Blackburn there may seem to settle the question here. But in that case it was established upon the construction of the particular statute incorporating the defendant company that there was on its part a duty to exercise its statutory powers of dredging and cleansing the channel. As Lord Justice Collins points out in *Southwark and Vauxhall Water Company* v. *Wandsworth Board of Works* (98, 2 Ch., 603) "In *Geddis* v. *Bann Reservoir Proprietors*, Lord Blackburn was dealing with a case in which the rights of adjoining owners had been in fact invaded, the statute under which the defendants acted not enabling them to flood the plaintiff's lands when such flooding might have been avoided by dredging, as the defendants had power to do, the channel by which they sought to pass their compensation water back to the river. They were under a duty to pass the water down to the river, and they were given powers to make and maintain channels for this purpose, and where they had not exercised these powers they could not say that the damage to the adjoining proprietors was a necessary incident of the exercise of their statutory right. The statutory power which Lord Blackburn thought them bound to exercise was one without which their duty of passing the water on could not be properly carried out." (*Ibid* 611). It is true, that here the Government or the Board as the owners of the soil can erect protective works of the kind mentioned by the plaintiff, but where is the duty making it obligatory to erect such works when, as already stated, they were using their property only in a natural manner unattended by negligence? The Government or the Board may have been bound so to construct the harbour wall as to interfere as little as possible with the plaintiff's property. Neither is, however, called upon to

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undertake any independent work for the protection of the plaintiff. In support of this, reference may be made to the case put by *Collins*, L. J., at page 612 in *Southwark and Vauxhall Water Company* v. *Wandsworth Board of Works*, by way of illustration, *viz.*, that of an owner of a house, for which no right of support from the adjoining house had been acquired, with reference to the owner of the latter house withdrawing the support to which the former owner was not entitled. Though in such a case the pulling-down owner must be careful to interfere as little as possible with the other house, he is certainly not called upon to take active steps for its protection as by shoring it up. Reference may also be made to *Ponting* v. *Noakes* (94, 2 Q. B. 281) as in principle a somewhat analogous case. Though it is well known that yew trees are poisonous to horses that eat of them, yet it was held in that case that a person who grew a yew tree near the boundary of his land was under no duty to take means to prevent his neighbour's horses from eating of the tree. In cases like the above there is, as *Collins*, L. J., pointed out, " a broad distinction between exercising a right with reasonable care so as not to do avoidable damage and taking active measures to insure the continuance of something that is not a right in the adjoining owner." (98, 2 Ch. 612). While I am in this part of the case I may refer to *King* v. *Commissioners of Sewers of Bognor* (6 L. J. King's Bench 338), not indeed as an authority for the proposition sought to be laid down here, but for showing to what unreasonable lengths the duty, if there be any such, would be carried, and that hence such a duty ought not to be implied in law. There Lord *Tenterden*, C. J., observed " if we were to say the Commissioners in this case were bound at their expense to erect a groyne to protect this land, as the effect of that erection might, and probably would, be to do damage to the land lying further eastward and then other persons would have a right to call upon them to erect a groyne to defend them and so they might go on travelling eastward from place to place until at last they came to the North Foreland. It is well known the sea is encroaching along the whole of the coast round by the Isle of Thanet notwithstanding it is so different from that of Felpham, it being a high line of chalk cliff. It has encroached very greatly even there. Now if we were to say the Commissioners could be called upon to do this, it would be carrying the proposition to an extent to which, as it seems to me, in reason and

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law it cannot be carried" (*Ibid* 342). Considering the difference between the sea and ordinary watercourses, it is difficult to maintain that the distinction, recognised in the case of the latter with reference to what may be done by way of defence and what may be done by way of natural user, is applicable to the former. Therefore, though the harbour wall in question was not raised by way of defence against the encroachment by the sea as in the case referred to, still it would seem that the reasoning of the Chief Justice in the above extract should be followed in cases like this, since the purpose for which the wall was built was a perfectly legitimate one. As regards the non-repair of the revetment which was constructed on the foreshore with a view to prevent the encroachment by the sea, it is scarcely necessary to say that in the circumstances of the case, that amounts to nothing more than a discontinuance of a favour shown by the defendants to the plaintiff.

In my view, therefore, the plaintiff has not shown that the Government or the Board had, in omitting to provide a revetment or sea-wall to protect his land, failed to carry out any duty which they owed to him. Such omission is therefore not actionable.

Supposing, however, that in building the wall without making adequate provision for the protection of the plaintiff's land the Government had infringed his right, still it cannot be held that the Board is responsible to him, since under Madras Act II of 1886, which vests the harbour in the Board, that body is not at liberty to spend any money coming to its hands for a purpose such as the construction of works needed for the protection of persons in the position of the plaintiff but not required for the purposes of the harbour. Now clauses 1 to 5 of Section 33 of the Act that enumerate the different specific purposes to which money received by the Board is to be applied have no reference whatever to works like the revetment. Nor can the words of the 6th and remaining clause "generally for the purposes of this Act" be possibly held to cover expenditure on such a work since as already stated it is not one required for any of the purposes of the Board. It is hardly necessary to say that had the Legislature intended to empower the Board to utilize its money in connection with the defence and protection of properties belonging to other persons affected by the construction of the wall in question, express provisions as to it would have been inserted in the Act. The absence of such provision is fatal to the

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suggestion that it is competent to the Board to devote any part of its moneys for protection and defence as aforesaid. In short, the Act must be held to empower the Board to maintain and improve the harbour, notwithstanding that the wall in question proved to be a nuisance to the plaintiff or those through whom he claims when it was constructed. This case is therefore distinguishable from *Jordeson* v. *Sutton, Southcoates and Drypool Gas Company* (98, 2 Ch. 614) cited for the plaintiff, in that there the statute under which the defendants were acting was construed to entitle them to exercise their powers only in so far as such exercise did not affect the legal rights of their neighbours.

In the view I take of this case in holding that the Board had been making only a natural use of the property any enquiry into whether the damage can be avoided or mitigated is quite immaterial. Much less will such enquiry be material even if the user be taken to be not natural, for the plaintiff will then have a right to relief for any consequential damage and the Court, as Lord Hatherly said in *Attorney-General* v. *Colney Hatch Lunatic Asylum* (L. R., 4 Ch. App. 146) "is not in the habit of listening to any argument on the ground of expense when it restrains the doing of a wrong." (*Ibid* at page 158). Nor is it necessary to consider the defendants' plea based on Section 87 of the Act. I would therefore dismiss the appeal with costs.

O'Farrell, J.—The plaintiff in this case is the proprietor of certain godowns situated close to the foreshore within the limits of the port of Madras as defined by Section 3 (2) of the Madras Harbour Trust Act II of 1886. The defendants are the Trustees for the Harbour, in whom the property both in the artificial harbour itself [as defined by Section 3 (3) of the Act] and in the foreshore within the limits of the port, are vested—see as to the latter Section 25 and Schedule A to the Act. The harbour was, as is well known, constructed by Government without statutory enactment and the Act of 1886 simply hands it over to the Trustees, giving them full powers of maintenance and improvement. At the time when it was so handed over it is common ground that erosion of the foreshore adjacent to the plaintiff's premises had set in as a consequence of the existence of the harbour. Subsequently, however, in exercise it must be presumed, of their powers of improvement the defendants extended the groynes.

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It is not denied that the sea has now encroached on and beyond the foreshore and has caused damage to the plaintiff's property. In the letter of 14th April 1898, addressed to the defendants by the plaintiff's solicitors and filed as Exhibit A, the claim would appear to be based on the defendants' act in extending the northern arm or groyne without taking due precautions to counteract the injury to private property that would thereby result, but in the further notice sent on 11th May the words "maintaining and extending" are used and in the plaint what is charged is that the defendants "negligently and unlawfully and without taking due and sufficient precautions to prevent injury from being thereby occasioned to the plaintiff, took over and allowed to continue and maintained and extended harbour arms or groynes, which at the time of such taking over had caused and were causing and have since continued to cause an encroachment of the sea on the coast to the north of the said harbour whereby the said foreshore to the east of the plaintiff's premises has been submerged and washed away by the inroad of the sea and the sea has been let in on to the plaintiff's said premises and the damage mentioned in the fifth paragraph hereof has been thereby caused."

Paragraphs 4 and 6 of the plaint refer to a specific means which, it is alleged, the defendants might have adopted for the prevention of damage, *viz.*, the proper maintenance of a revetment or stone barrier already constructed by them on the foreshore. The particulars of the grounds of claim furnished by the plaintiff after the settlement of issues also make mention of the defendants' failure to properly maintain the revetment as constituting the negligence complained of. Further, the plaintiff's counsel at the hearing appears to have distinctly admitted that the erosion complained of was the natural and necessary consequence of the construction of the harbour but that that consequence might have been prevented by remedial and preventive measures which it was the duty of the defendants to adopt.

The first and most important question we have now to decide is, whether the learned Judge was right in his finding that the plaintiff had made out no cause of action, and I have been thus particular in setting out the pleadings and contentions of the plaintiff, because it is upon them that the whole question turns. I think

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two things are clear from what I have previously said—*first*, that the foundation of the plaintiff's case is *negligence*, and, *secondly*, that that negligence is not anything done or omitted by the defendants (or their predecessors in title, the Madras Government) in the construction or maintenance of the harbour itself, but the failure to take remedial or preventive measures to counteract the necessary results of such construction and maintenance. I do not think it is open to the learned Advocate-General now to argue that it lay upon the defendants to prove that the harbour had, in the first instance, been constructed, or the groynes extended, in the best and most skilful manner possible so as to effect the purpose intended without causing damage to private property. The plaintiff's case I take to have been that, however skilfully the work was carried out, it was inevitable that damage should ensue unless certain additional measures were taken, and the gist of his complaint is that these measures were not taken.

This being, as I conceive, the real matter at issue, the law to be applied is not doubtful; as is, in fact, conceded by the learned counsel for the respondents. It is best stated in the words of Lord Blackburn in *Geddis* v. *Proprietors of Bann Reservoir* (L. R., 3 A. C., page 430 at page 455). His Lordship says "I take it without citing cases that no action will lie for doing that which the Legislature has authorised, if it be done without negligence, although it does occasional damage to any one; but an action does lie for doing that which the Legislature has authorised, if it be done negligently. And I think that if by reasonable exercise of the powers, either given by statute to the promoters, *or which they have at common law*, the damage could be prevented, it is, within this rule, 'negligence' not to make such reasonable exercise of their powers." These observations sum up in a compendious form the principle of the *Taff Vale Railway* and *Hammersmith Railway* cases and others of the same nature. I do not think, with the greatest respect for the learned Judge whose judgment we are considering, that he is right in drawing a distinction between nuisance caused by the mere existence of a railway or a harbour or the like and those which are the result of their daily user. In principle it seems difficult to see any reason for such a distinction and, in fact, in one case which has been much commented upon at the bar (*Cracknell* v. *The Mayor, &c., of Thetford*—L. R., 4 Common

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Pleas, 629), it was the "mere existence in a state of quiescence" of the staunches put down by the defendants which in combination with the action of natural forces caused the damage, that was relied upon as the foundation of the suit. No such distinction as is now suggested was there set up, though it would have been clearly pertinent. I need not, however, say anything further on the point as the learned counsel for the respondents has frankly conceded that if, by a reasonable exercise of the powers vested in the Trustees, they could construct a sea-wall or revetment on the foreshore which would protect the plaintiff's property, they are bound to do so. His contention is that they are not authorized to construct any such sea-wall except for the purpose of protecting the harbour itself, and that to employ the public funds at their disposal for the protection of the plaintiff's property would be a breach of trust. He refers us to Sections 60 and 61 and also to Section 33 of the Act and relies upon *Cracknell* v. *The Mayor, &c., of Thetford* and *Geddis* v. *Proprietors of Bann Reservoir* already cited. In the former case the corporation were found to be not liable because they were held to have no power under the statute to remove the silt or cut the weeds except for the purposes of improving the navigation. In the latter case, the corporation were held to have such statutory powers and were, therefore, declared liable. In both cases the decision turned upon the existence or non-existence of statutory powers. No question of common law powers arose in either case, because in the former the corporation were not the owners of the soil on which the weeds grew and the silt was deposited, and similarly in the latter they had a mere easement in the bed of the Muddock (see page 437 of the Report). Now in the present case there is an important distinction; the defendants are the owners of the foreshore as I have already noted. As such owners they have, subject to any express or implied restrictions imposed by the Act itself, the power to erect sea-walls on the foreshore. The whole question is then narrowed to this, is there anything in the Act which does restrict them? Section 60 says that they may execute such works as they may determine to be necessary for the purposes of the harbour. Section 61 says such works may include (and I would note in passing that the word "include" seems to imply that the enumeration is not intended to be exhaustive) various works, all obviously having direct reference to the purposes of the harbour

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if the Board were authorized to construct sea-walls for the purpose of protecting private property, and if by reasonable exercise of such powers they could have obviated the damage to the plaintiff's property, they were bound to do so. His point was that the Board, on the construction of the Act, did not possess any such powers. That the learned counsel was right in making this admission appears to me to be clear from a consideration of all the cases, notably the railway cases referred to by *Collins*, L.J., in the case *Southwark and Vauxhall Water Co. v. Wandsworth Board of Works.* In *Vaughan* v. *Taff Vale Railway Company*, for instance, it was found—and the point was relied on in all the judgments—that the the Railway Company had taken every precaution and adopted every means in their power which science could suggest to prevent their engines from emitting sparks. In that case it is clear that the defendant Company took active measures to prevent injury. The supplying of a smoke cap to the chimneys of the locomotives, the securing of the ashpan, the slowing down of the pace of the engines to the minimum point consistent with practical utility, were all active measures for the protection of private owners of property and were not only not required for the working of the railway but tended to prejudice its efficiency. If the Company could have contended that it was under no duty towards the owners of adjoining property, I think it is inconceivable that the point should not have been taken. In *Geddis's* case the House of Lords expressly decided that "where persons were incorporated by Act of Parliament for a particular purpose................. if the effecting of it may occasion (not only in the course of originally erecting the necessary works for the required purpose, but at recurring intervals afterwards) inconvenience or injury to others, they may be treated as under an obligation to take, from time to time, measures to prevent the occurrence of such inconvenience and injury." As Lord Hatherley remarked in that case (see p. 450) "you shall use all those precautions against injury to others which you would use against injury to yourselves in carrying on a similar work, and if we find that in carrying out your powers damage has been done by you, the law will say that the powers which you can exercise shall be exercised for the prevention of mischief." I do not understand Lord Justice Collins in the *Southwark and Vauxhall Water Company's* case to dissent from the dictum of Lord Blackburn in

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Geddis's case. He merely pointed out that it was applicable only to cases where an actual right has been invaded. The Water Company in *the Southwark* case had laid their pipes at a certain depth below an uneven road which they knew the defendants had a statutory right to level. They paid nothing for the privilege. They had acquired no right to a particular thickness of soil above their pipes. In such circumstances, *Collins,* L. J., held that *Geddis's* case did not apply. In other words, the defendants would not be bound to take active steps to prevent injury to a person having a mere privilege, as distinguished from an actual right.

It must be remembered, I think, that the immunity from actions for damage established by the *Hammersmith Railway* case and other cases in respect of the promoters of works of public utility is itself a novel doctrine, which was forced upon the Courts by the manifest absurdity of applying the principles underlying *Fletcher* v. *Rylands* and similar cases to the growing industry of railways. The principle was not finally established without much opposition. The earliest case *R.* v. *Pease* was decided in 1832 and even so late as 1869 we find no less an authority than *Baron Bramwell* prepared to hold that that case and similar cases such as the *Taff Railway* case were wrongly decided.

In regard to the cases cited by the learned Officiating Chief Justice relating to the "natural" user of lands I venture, with the greatest deference, to think that the construction of a harbour is not a natural user in the sense in which the word is employed in those decisions. I think the word as there used means 'common or usual', 'ordinary or every day' or the like. In *Fletcher* v. *Rylands* the storage of water in a tank on the defendant's land was termed by Lord Cairns a 'non-natural' use of the land and this is, I think, the sense in which the language used in the decisions cited by the Officiating Chief Justice must be understood. The attempted distinction is, I believe, generally conceded to be an unfortunate one, and is probably the chief reason why *Fletcher* v. *Rylands* has been exposed to so much adverse criticism, notably in America.

As to the other point in the case, whether the defendants had the power to construct sea-walls for the protection of private property, I have little to add to what I have already said. If the de-

fendants are—as I conceive they are—under a common law obligation to protect the owners of property (if that can be reasonably done) from injury caused by the existence of the harbour, that obligation can only be taken away by express words, which I do not find in the statute. As observed by Lord Cairns in the *Hammersmith Railway* case, "The Legislature has very often interfered with the rights of private persons, but in modern times it has generally given compensation to those injured; and if no compensation is given, it affords a reason, though not a conclusive reason, for thinking that the intention of the Legislature was not that the thing should be done at all events, but that it should be done, if it could be done, without injury to others. What was the intention in any particular Act is a question of the construction of the Act." The plaintiff is admittedly not entitled to compensation under the Act and I can find nothing in the Act to prohibit expenditure for such purposes as I have indicated. It is, no doubt, not specifically mentioned in the Act, but no more are other items of legitimate expenditure, *e.g.*, the payment of legal expenses incurred for the defence of actions brought against the Board.

With regard to what is a 'reasonable exercise' of the defendants' powers, if any, to construct sea-walls, I would desire, in order to guard against misconception, to say that the expression must have regard to all the circumstances not only of the particular case but of similar cases likely to occur. If the result of a reasonable expenditure to protect the plaintiff's property will be to entail further expenditure which would be unreasonable (as *e.g.*, the construction of protective walls through the entire length of the port) then even the original expenditure would become unreasonable. That, however, is a question of fact which I do not desire to prejudge.

The other point urged by Mr. Ryan for the respondents is that they are in any case protected by the last clause of Section 87 of the Act which provides that neither the Board nor any of its officers or servants shall be liable in damages for "any act *bonâ fide* done or ordered to be done by them in pursuance of this Act." There was an issue on the point in the Court of First Instance and it was decided against the defendants. I agree with Mr. Justice Shephard that this section has no reference to the present case.

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It applies, in my opinion, to cases where acts are done by the Board or its servants without legal authority or in excess of legal authority but under the *bonâ fide* belief that they were acting by or within that authority. The words '*bonâ fide*' show this. They can have no meaning as applied to acts that are not merely believed to be, but really are, authorized by law. The words quoted are intended, I think, to confer an immunity similar to that afforded to Magistrates who act without jurisdiction but in good faith and in a reasonable belief that they have jurisdiction.

In the result I would allow the appeal and as the suit has been decided on a preliminary point I would remand it for disposal on the merits with the remark that the question to be determined on the 4th issue is whether the damage complained of could have been obviated or materially mitigated by a reasonable expenditure on the construction of sea-walls on the foreshore or on other remedial or precautionary works of a like nature.

(Under Section 575 of the Code of Civil Procedure the appeal was dismissed with costs.)

Solicitors for appellant: *Barclay, Orr and David.*

Solicitors for respondents: *King and Josselyn.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Moore and Mr. Justice O'Farrell.

Viraraghava Aiyangar ... ... *Appellant**
(*in both the cases.*)

v.

Ponnammal ... ... *Respondent*
(*in both the cases.*)

Viraraghava Aiyangar v. Ponnammal.

Limitation Act, Art. 179—Suit against several—Appeal by one—Execution of decree—Limitation—Starting point.

On the 31st March 1891, a decree was passed directing the payment of Rs. 1,523-2-0 by the first defendant and the sale of the mortgaged properties on default. The second defendant, son of the first was made personally liable for costs. The second defendant appealed to the District Court on the ground that his share of the properties should not have been made liable for the debt. The District Judge remanded the case for disposal upon the merits so far as the claim against the second defendant was concerned. The District Munsif passed a revised decree which was

* L. P. A. 66 and 67 of 1898. 15th August 1899.

confirmed on second appeal on February 22, 1897, with some modifications. The first defendant was no party to any of these proceedings. On August 7, 1897, the plaintiff applied for execution of the decree. The first defendant contended that the only decree executable against him was that of the 31st August 1891 and that the application was therefore barred.

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Held that by the appeal preferred by the second defendant, the decree against the first was imperilled and that limitation began to run only from the 22nd February 1897 when the final appellate decree was passed.

Obiter:—The language of Art. 179 is clear and postpones the starting point of limitation to the date of the appellate decree, whether the appeal is by all the parties or by only one or some of them. The 'imperilling' test is opposed to the plain language of Art. 179 and should not be allowed to disturb the starting point of limitation, I. L. R., 18 B., 203; I. L. R., 22 B., 500; I. L. R., 23 C., 876; I. L. R., 25 C., 594, and 8 M. L. J. R., 228 approved; I. L. R., 12 M., 479 doubted.

Appeals under Section 15 of the Letters Patent against the Orders of Mr. Justice Davies, on C. M. S. A., Nos. 21 and 22 of 1898 presented against the Orders of the District Court of Tanjore passed on A. A. O., Nos. 899 and 909 of 1897.

The facts appear from the judgment of *Moore, J.*

P. R. Sundara Aiyar and S. Gopalaswmi Aiyangar for appellant.

J. L. Rozario for *C. Sankaran Nayar* for respondent.

The Court delivered the following

JUDGMENTS :—*Moore*, J :—In the decree passed in Original Suit No. 358 of 1889 on the 31st March 1891 the District Munsif of Valangiman directed that the plantiff should recover Rs. 1,523-2-0 from the 1st defendant and by sale of certain mortgaged property with interest and costs and that the 2nd defendant (the undivided son of the first defendant) should be held personally liable for the plaintiff's costs. The 2nd defendant appealed to the District Judge (Appeal Suit No. 319 of 1891), his main contention being that his share of the property should not have been held to be liable. The 1st defendant was not joined as a party to this appeal. The District Judge of Tanjore on the 26th October 1891 set aside the decree of the District Munsif in so far as the 2nd defendant was concerned and remanded the suit for re-trial with respect to his liability. An appeal was preferred against this order but the High Court declined to interfere with it. In accordance with the directions contained in the remand order, the District Munsif delivered a revised judgment on the 23rd July 1894. In the heading of this judgment the

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defendants are set forth as Viraraghava Aiyangar (1st defendant) and two others. It is, however, admitted that the 1st defendant did not appear either in person or by pleader before the District Munsif in connection with the second trial and there appears also to be no doubt that notice was not served on him. In the decree his name is given but while it is mentioned that the 2nd defendant appeard by Vakil nothing is said as to whether the 1st defendant appeared or not. In the decree it was directed that the plaintiff should recover the amount sued for with costs on the security of the mortgaged property including the 2nd defendant's share and a provision, not to be found in the original decree, was added to the effect that the 1st and 2nd defendants were allowed two months' time for payment. The 2nd defendant appealed to the District Judge against this decree but his appeal was dismissed (Appeal Suit No. 504 of 1894). To this appeal also the 1st defendant was no party. A second appeal to the High Court was filed by the 2nd defendant, the 1st defendant not being joined, and the final appellate decree was passed on the 22nd February 1897 (Second Appeal No. 1597 of 1895). In this decree it was directed that the 1st defendant should pay to the plaintiff Rs. 1,523-2-0 with interest and it was further ordered that on the 1st defendant paying the amount due within three months the plaintiff should deliver up all documents in his possession relating to the mortgaged property and that in default of payment the 1st defendant's share of the mortgaged property should be sold and it was finally directed that the plaintiff should be permitted to proceed against the 2nd defendant's share of the properties in execution of the decree treating it "as a mere money decree." When on the 7th August 1897 the plaintiff applied to the District Munsif for execution of the decree the 1st defendant pleaded that it was barred by limitation in so far as he was concerned. The District Munsif held that there was no bar and on appeal this order was confirmed by the District Judge. Mr. Justice Davies (Appeal against Appellate Order No. 21 of 1898) refused to interfere with the order of the District Judge and against his decision the present two Letters Patent Appeals have been preferred.

The main contention urged on behalf of the 1st defendant is that, as he was no party to any of the proceeding in this case

subsequent to the decree of the 31st March 1891, that decree is the only one that can be held to be binding on him and that, such being the case, the plaintiff's claim as against him is barred by limitation. On behalf of the plaintiffs it is contended that this question is to be decided in accordance with Article 179 of the second Schedule attached to the Limitation Act which provides that when an appeal has been preferred against a decree time begins to run in so far as execution proceedings are concerned from the final decree of the Appellate Court, *i.e.*, in the present case from the 22nd February 1897. Mr. Justice Davies dismissed the appeal presented to him on the ground that, as the decree against the 1st defendant, the father, was imperilled by the appeal of his son, the 2nd defendant, the case was distinguished from that disposed by the decision in *Muthu* v. *Chellappa*, I. L. R., 12 M., 479. It appears to me that this dnfiing to the effect that the decree against the 1st defendant was imperilled, by which I suppose nothing more is meant than rendered liable to alteration or reversal, by the appeal preferred by the 2nd defendant, must be upheld. The decree of March 1891 made the shares of both the 1st and 2nd defendants liable. Against it the 2nd defendant appealed and if his contentions had prevailed and he had been relieved from liability the result would have been to increase the liability of the 1st defendant. A similar remark applies to the revised decree of July 1894 and the appeal preferred by the 2nd defendant from it to the District Judge. In this revised decree it may be noted that a slight modification of the original decree was made in so far as the 1st defendant was concerned as it gave him two months' time in which to pay. The result of the second appeal preferred to the High Court from the decision of the District Judge was that a most important alteration was made in the decree of the District Munsif and that it was directed that the share of the 1st defendant alone shall be liable to be sold in satisfaction of the mortgage amount the plaintiff, however, being permitted to proceed against the 2nd defendant's share, "in execution of the decree treating it as a mere money decree." The effect of this the final appellate decree, is certainly, as the District Judge points out, to throw an extra burden on the 1st defendant's share and, such being the case, it must be held that the decree as against the 1st defendant was imperilled by the subsequent proceedings taken in appeal. This finding is sufficient for the disposal of

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the present appeals. I may, however, add that, with all due deference to the learned Judges who decided the case of *Muthu* v. *Chellappa,* I. L. R., 12 M., 479, I am of opinion that in all cases such as the present where all the judgment-debtors do not appeal no question arises, in so far as the bar by limitation with respect to execution proceedings is concerned, as to whether the decree as against the remaining judgment-debtors is imperilled by the appeal or not. The words of the second clause of Article 179 of the second schedule attached to the Limitation Act are, in my opinion, clear and should be followed by the Courts. What is there laid down is that where an appeal is preferred from a decree the period of limitation with respect to execution is three years from the date of the final decree of the Appellate Court. Whether all the judgment-debtors or some only of them have appealed makes in my opinion no difference. There is only one decree that can be executed and that is the final decree of the Appellate Court. There has in the past been a considerable conflict of authorities as to this but of late the decisions are strongly in support of this view. Reference may be made *inter alia* to the decisions in *Sakhalchand Rikhawdas* v. *Velchand Gujar,* I. L. R., 18 B., 203, *Abdul Rahiman* v. *Maidin Saiba, Ib.,* 22 B., 500, *Harkant Sen* v. *Biraj Mohan Roy, Ib.,* 23 C., 876, *Gopal Chunder Manna* v. *Gosain Das Kalay, Ib.,* 25 C., 594. This last is a decision of a Full Bench and in the order of reference from a Divisional Bench the greater number of the conflicting decisions above referred to, are noted. I may also draw attention to an unreported decision of the Officiating Chief Justice Shephard printed at page 228 of the 8th volume of the Madras Law Journal in which the law as laid down in I. L. R., 25 Cal., 594, is approved and followed. These appeals should, in my opinion, be dismissed with costs.

O'Farrell, J:—I concur in the Judgment just pronounced by Mr. Justice Moore. On the general question as to the construction of Article 179, Schedule II of the Limitation Act, I think that the plain words of the Act have been unduly narrowed by the decision reported in I. L. R., 12 M., 479, and that the consideration of such subtle points as whether a decree was or was not 'imperilled' by an appeal was foreign to the intention of the Legislature. There has always been a considerable body of judicial opinion adverse to the earlier Calcutta decisions which the Madras decision followed and these Calcutta decisions have now been overruled by an

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unanimous decision of a Full Bench of five Judges of the Calcutta Court itself. I have little doubt that when the question comes to be considered by a Full Bench of this Court the latest Calcutta decision will be followed. Limitation in respect of execution proceedings rests, I think, on somewhat different grounds from limitation in regard to suits. In the latter case it is contrary to public policy that a matter in dispute resting upon testimony, should be agitated after a period when that testimony may have grown dim or opposing testimony be difficult or impossible to be procured. In the case of execution proceedings, there is ordinarily no matter in dispute at all. The only ground for refusing execution of a decree after a certain lapse of time is that it is not considered fair that a judgment-creditor should lull his debtor into a false sense of security and then suddenly execute a decree which the debtor may have thought he intended to forego. In a case where the law provides that the period for execution of a decree is prolonged by an appeal being preferred, the debtor cannot be misled. A suspension of execution, so far from being an injury to him, is in such cases a positive advantage, as it gives him further time for satisfaction of the decree. Moreover, by the making of merely formal application for execution, a decree-holder can in any case keep a decree alive for twelve years—a longer period than is likely to elapse during the pendency of an appeal. The mischief of the view which I am now contending against is that it needlessly introduces an element of uncertainty into the execution of decrees—of which the present protracted litigation is an apt example.

In the present case, however, I do not think it necessary to go beyond the four corners of the decision in I. L. R., 12 M., 479. On any view, the decree as against the 1st defendant was 'imperilled' when the 2nd defendant appealed on grounds which went to the root of the whole transaction. It is, however, ingeniously contended that if this was the case at first, it ceased to be so when the Appellate Court in its order of remand declined to disturb the decree as against the 1st defendant and remanded the suit for re-trial as regards the liability of the 2nd defendant only. It is urged that on 26th October 1891 when this order of remand was passed by the District Court the decree against the 1st defendant ceased to be imperilled. The fallacy, however, seems to me to consist in looking upon an order in remand, refusing to disturb a decree as

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regards one defendant and directing a re-trial as regards another, as equivalent to a final decree in favour of the former defendant. This is, I think, not so. Until the Original Court has re-tried the question remanded there is no final decree in the suit, and if against the decree finally passed in remand a fresh appeal is preferred by one defendant, the Appellate Court is again seized of the whole subject-matter of the appeal, and may in a proper case alter the decree in favour of the defendant who has not appealed, and this despite its former refusal to interfere on his behalf. In this view the whole decree has throughout been imperilled by the appeals preferred by the 2nd defendant and the period from which limitation has to be reckoned is the date of the final decree of the High Court in second appeal. I concur in the order proposed by Mr. Justice Moore that both these appeals should be dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—The Mr. S. Subrahmania Aiyar, Officiating Chief Justice, and Mr. Justice Moore.

Kongatti Valia Nayar ... ... Appellant (*Plaintiff*).*

v.

Subramanian Pattar ... .. Respondent (*Defendant*).

Kongatti Vilia Nayar v Subramanian Pattar.

Construction of document—Description—Lease—Mortgage—Authority coupled with interest.

The question of the nature of a document, whether it is a lease or mortgage, &c., must be determined not by reference to what the document describes itself to be, but by reference to the provisions of the whole instrument.

Where the defendant was put in possession of property by the plaintiff under an instrument which provided that the defendant should manage the property for a space of 18 years and pay himself from the income thereof any advances that he might make to the plaintiff or on his behalf but that the defendant's heirs should have no manner of right to the property and that at the end of the contract the defendant should account for the moneys that had come into his hands :—

Held, that the document was neither a lease nor a mortgage but an authority coupled with an interest, that accordingly the power could not be revoked and that the suit for account, which depended upon the validity of the revocation, was not sustainable.

Appeal from the decree of the Subordinate Judge's Court of South Malabar at Palghat in No. 28 of 1897.

* A. 191 of 1898. 14th July 1898.

V. Bhashyam Aiyangar, C. Sankaran Nayar and *K. P. Govinda Menon* for appellant.

P. R. Sundara Aiyar for respondent.

The Court delivered the following

JUDGMENTS :—*The Officiating Chief Justice.*—The appellant (plaintiff) sues for the recovery of moneys said to be due to him by the respondent (defendant) in respect of the appellant's properties which are in the respondent's possession and which were handed over to him under Exhibit I executed on the 2nd June 1892 by the appellant—as the present holder of the Kongot Valia Nayar. Stanam or dignity and thirty-nine others interested in the properties as persons entitled to succeed to the stanam.

The appellant proceeds entirely on the view that Exhibit I conferred on the respondent but a revocable power—which was duly revoked before the suit. The respondent denies the correctness of this view and his main contention apparently is that the transaction evidenced by Exhibit I operates solely either as a lease or a usufructuary mortgage, though in his written statement he also raises the plea that if he is an agent his authority is irrevocable.

Exhibit I runs thus.—Least (lease ?) that is *Kuttaka Karar*, executed by (1) Konhattil Valia Nayar Avargal bearing the name of Purakan and the stanam name of Kolattur Kandan Chattan Kovil, son of Puravathodiyil Ittichiruthi *alias* Mullakara Amma, residing in Kongad Amsom and Desom of Palghat Taluq, (2) Elaya Nayar bearing the name of Thappunni, son of Naduvila Eittil Ittotti Kunchi Amma of the said Desom, (3) third Nayar bearing the name of Kunjunni, son of Mayil Kottil Ittichirthi Kunchi Amma of Charaya Amsom and Desom, (4) Mullakara Nayar bearing the name or Unni Ittinan, son of Palasseri Ammu Kunchi Amma, of Pozhakatteri Amsom, Mannangulam Desom of Walluvanad Taluk, and the undersigned heirs who in order of seniority are to succeed to the stanam of No. 1, to Kundur Koottalamadathil Subramania Patter, son of Pichu Patter, of Thenur Desom Mankara Amsom of the said Taluk. Whereas the immoveable properties belonging to the stanam of Kongattil Muppil Nayar, which executant No. 1 at present bears and which

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the remaining executants will hereafter attain in the order of seniority, are in the possession of various tenants on kanom and other rights, and whereas in respect of such properties the deceased stanam-holders created some simple debts and fresh kanoms without stanam necessity and without consideration, and had decrees passed in respect of some simple debts, and the jenmam right over some immoveable properties sold, and whereas sufficient funds are not available in order to have such debts, fresh kanoms and sales declared invalid by suits and to pay off such debts as you may consider as having been contracted for stanam purposes and for full consideration, and to defray daily household and other expenses on the scale now arranged, we requested you to advance the requisite money and to conduct suits, pay off the debts which, as aforesaid, you may be satisfied, were contracted for stanam purposes and to defray the expenses, and you have consented to the request. And in consideration of your doing so, we have given over to you all the immoveable properties belonging to the stanam on contract lease (Kuttakapattam) together with 1st executant's right of signature for a period of eighteen years from this date.

2. It is agreed that you are to exercise for eighteen years all such authorities as may be exercised by the 1st executant, such as, entertaining servants on monthly salaries and, out of the approximate annual collection of 1,720 paras of paddy and Rs. 80, collecting such as may be lawfully leviable, with interest on arrears, as rent, porapad and other incomes belonging to the stanam, executing, registering and delivering documents in respect of old kanoms and also new kanoms raised for proper purposes on receipt of renewal fees provided that such kanoms shall not be increased in amounts, digging elephant pits and catching elephants, collecting rents on thorns and bamboos, &c., which may be removed by people from forests.

3. It is agreed that you are to draw the Malikhana due to the stanam under receipts signed by executant No. 1 and disburse to the individuals mentioned in schedule A the sums mentioned therein, and obtain their receipts, utilizing the balance together with the income derived from immoveable property in defraying the charges particularized in schedule B according to your discretion.

4. As regards the immoveable properties belonging to the devasoms of which the stanam possesses the sole *uraima* right or *uraima* right conjointly with others, it is agreed that the power to execute documents, to conduct suits, to collect arrears of rent with interest and future income and all other rights and powers which are vested in executant No. 1 shall for eighteen years vest in you.

5. It is further agreed that you shall keep accounts of the charges as per schedule B and of all other expenditure out of the collections relating to the stanam and devasom and furnish a copy thereof to executant No. 1 or to his successor on 30th of Chingom in each year and that you shall defray the expenses of litigation according to your discretion, and that we shall accept the said charges.

6. This *Kuttaka karar* shall be equally binding on the remaining executants when they succeed to the stanam of executant No. 1.

7. If any obstruction be thrown in the way of your receiving the malikhana by the 1st executant or by any other member succeeding to the stanam of executant No. 1 failing to sign and deliver to you receipts from time to time, the responsibility of making the distribution as per schedule A shall not rest on you. All balances after deducting the amounts payable to anandravars you can recoup yourself from other incomes due to the stanam.

8. In all litigations for cancellation of new kanoms and jenmam sales, unless failure is due to palpable negligence on your part, all losses that may result shall be borne by us.

9. You have the authority to collect rents, porapad and forest dues and to recover lands on payment of kanom, &c., and also to conduct suits relating to stanam and its devasoms until the expiry of the term of this contract.

10. All sums of money which you may spend for litigation expenses, for payment of debts and in meeting current expenses and all expenses necessary for carrying out the purposes of this contract, you should appropriate with interest thereon at 1 per cent. per mensem from the income of the stanam.

11. The amounts due to you on the above accounts at the end of each year, you shall show in the accounts referred to in

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paragraph 5 and you shall thereafter add interest thereon at the above rate.

12. It is agreed that, if, on the expiry of the contract, any amount is found due to you, the stanam properties shall be liable for the same with interest; similarly if any amount is found due by you, your properties shall be liable for the same.

13. It is also agreed that executant No. 1 shall make over to you with a signed list all records relating to the stanam and the devasoms retaining with him a copy thereof, and that on the expiry of the contract period you shall deliver over to executant No .1 or to his successor all records as per aforesaid list and also all such copies of records relating to, and required for purposes of, suits, &c., as you may have obtianed at your expense and obtain receipt therefor.

14. It is further agreed that after the expiration of your contract period, each successor to the stanam of No. 1 shall meet all charges relating to any year out of the income of that year and shall not contract simple debts or raise new kanoms on lands or assign away lands, and that should any such acts be done the same shall not at all be binding on the stanam.

15. It is also agreed that this contract shall be in force only during your life-time and that your heirs shall have no power to settle the accounts up to such period.

The first point for consideration is whether the transaction is a lease. The question is of course one of construction and the intention of the parties has to be ascertained, not from particular expressions to be found in the instrument, but from the provisions thereof as a whole. In *Taylor* v. *Caldwell* (32, L. J., Q. B., 164) it was held that the transaction there was not a lease though the parties had called it a letting and the money to be paid 'rent'—both of which words, *Blackburn* J. observed, were inaccurately used. The circumstance, therefore, that Exhibit I itself refers to the arrangement as a 'lease' is by no means decisive of the matter. Such a description must be treated as erroneous if it appears beyond doubt from the rest of the document that the relation created is not that of landlord and tenant. On behalf of the appellant it was first urged that the instrument in question reserves

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no rent and the transaction cannot therefore be held to be a lease. Whether the reservation of rent is essential for a lease and if so whether the respondent's undertaking to conduct litigation arising with reference to stanam properties and to do other acts mentioned in the instrument may or may not be considered as coming within the words "service or any other thing of value" in section 105 of of the Transfer of Property Act, which defines a lease of immoveable property, it is unnecessary to consider, inasmuch as the other argument urged for the appellant and founded on the provisions of the contract as to profits of the properties handed over to the respondent must be held to be well founded and clearly fatal to the construction that the instrument operates as a lease. Now, it is unquestionable that for a lease it is essential not only that the alleged lessee is given a right to the exclusive possession of the land, but also that he is given a right to the profits thereof in his right as lessee. If authority were necessary for so plain a proposition, it is sufficient to refer to the definition in Bacon's Abridgment of "a lease for years" which is stated to be "a contract between lessor and lessee, for the possession and profits to lands, &c., on the one side, and a recompense by rent, or other consideration, on the other." (7th Edition, Volume IV, p. 632) and the same law is laid down in the section of the Transfer of Property Act already referred to and which speaks of a lease of immoveable property as "a transfer of a right to enjoy such property." Of course a right to enjoy such property implies and includes a right to take its rents and profits as lessee. It is true that Exhibit I entitles the respondent to collect and receive all the profits derivable from the properties handed over to him. The profits, however, are treated not as his but as belonging to the holder of the stanam; although it is provided that the respondent is to repay himself any sums he may have to advance on behalf of the owner as stated in the instrument. Mere collection and receipt of the rents and profits in such circumstances cannot, it is obvious, be held to be an enjoyment within the meaning of the authorities quoted above. The provisions of the instrument as to this essential matter being sufficient to shew that the contention that the transaction amounts to a lease is untenable, it is not necessary to dwell on the other provisions which were relied on as likewise pointing against that contention.

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Nor is the alternative contention that the transaction is but a mortgage sustainable. It is true that the appellant's properties, in the hands of the respondent, are made expressly liable for what might be shewn to be due to him on account of advances made by him on behalf of the appellant. That that however was not the main object of the parties is manifest from the provision which expressly prohibits the heirs of the respondent from interfering with the possession and management should the respondent die before the expiry of eighteen years during which he was empowered to hold the same—a provision which will be repugnant and void if the transaction were a mortgage and nothing more. On the contrary the main object of the transaction was to authorize the respondent to take possession of the properties and manage them during the specified period for the benefit of owner. Such being the chief intent of the parties the real question for decision is whether the authority thus conferred is one which the appellant cannot revoke. In other words, is it an authority coupled with an interest? In *Carmichæl's* Case (1896, 2 Ch. 643), which seems to be the latest case on the point, the Court of Appeal followed an observation of *Williams*, J., in *Clerk* v. *Laurie* as to what is meant by an authority coupled with an interest being irrevocable. That observation runs: "what is meant by an authority coupled with an interest being irrevocable is this—that where an agreement is entered into on a sufficient consideration whereby an authority is given for the purpose of securing some benefit to the donee of the authority, such an authority is irrevocable" (2 H. & N., 196 and 200). The principle thus enunciated seems to be applicable here. In the first place ample consideration passed from the respondent for the agreement that he should have the possession and management for the stated period; for he bound himself to pay from time to time out of his own funds moneys properly wanted for the purposes mentioned in the instrument, *viz.*, legal proceedings to be taken for the protection of the interests of the stanam, the discharge of debts binding on it, the maintenance of the persons enumerated in Exhibit I and other purposes within the contract, and in the next place the authority to hold possession and realise the rents and profits was undoubtedly in part intended to enable the respondent from time to time to reimburse himself all advances he may make in accordance with the provisions of the contract. Consequently the

power cannot but be taken to secure to the donee thereof a clear and tangible benefit.

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The revocation of the power on which the suit altogether rests being invalid, the appeal fails and on that ground it is dismissed with costs.

Moore, J.—I concur.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Boddam and Mr. Justice Moore.

Kotaiya and another ... ... Appellants*, (*Defendants* 2 and 3)

v.

Lakshmaiya and another ... ... Respondent (*Plaintiff* and 1st *Defendant*).

Kotaiya v. Lakshmaiya

Practice—Appeal part-heard by the District Judge—Transfer to the Court of Subordinate Judge—Continuation of the hearing—S. 13, Civil Courts Act, (Madras)—S. 25, Civil Procedure Code.

Where an appeal part-heard by the District Judge was transferred to the Subordinate Judge and he *continued* the hearing and disposed of the appeal :—

Held that the procedure was irregular and that the appeal should be re-heard.

Second Appeal from the decree of the Sub-Judge's Court of Kistna at Masulipatam in A. S. No. 275 of 1894 reversing the decree of the Court of the District Munsif of Narasarapeta in O. S. No. 640 of 1892.

V. Krishnaswami Aiyar and *P. Nagabhushanam* for appellants.

R. Sriramulu Sastri for 1st respondent.

The Court delivered the following

JUDGMENT :—It is clear that this case has been dealt with in a way which cannot be justified. The appeal was to a District Judge and after the appeal had been part-heard by him it was transferred to the Court of the Sub-Judge who continued the hearing and reversed the decree of the District Munsif. We must reverse the decree of the Subordinate Judge and remand the appeal to the District Judge for hearing and disposal according to law.

Costs will abide the event.

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* S. A. 863 of 1898. 24th August 1899.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Moore.

Krishna Aiyan ... Appellant* 1st Defendant).

v.

Raghavaiyan and Others ... Respondents (Plaintiffs and Defendants 2nd and 3rd).

Krishna Aiyan v. Raghavaiyan.

Civil Procedure Code, S. 317—Execution purchaser—Purchase in stranger's name—Suit by a coparcener of the execution purchaser.

Under S. 317, C. P. C., it is not competent to a person to maintain a suit against a certified purchaser on the ground that the purchase was made on his behalf or on behalf of any other person *through* whom he claims. But it is open to the coparcener of the real purchaser (who does not claim through him) to prove that the purchase made in the name of the certified purchaser was really made on behalf of the family to which he belongs and maintain a suit for the recovery of what, on that footing, may belong to him.

Bhod Singh Doodhooria v. Guneschunder Sen, 19 W. R., 356, *Natesa v. Venkataramaiyah*, I. L. R., 6 M., 135 and *Meenakshi Ammal v. Kalliana Ramaiyan*, I. L. R., 20 M., 349 followed. *Ramakurup v. Sridevi*, I. L. R., 16 M. 290 referred to.

Second appeal from the decree of the District Court of Tanjore in A. S., No. 819 of 1897 reversing the decree of the Court of the District Munsif of Mannargudy in O. S., No. 519 of 1896.

The facts appear from the judgment of *Subrahmania Aiyar*, J.

P. R. Sundara Aiyar for appellant.

P. S. Sivaswami Aiyar for V. *Krishnaswami Aiyar* for 1st respondent.

The Court delivered the following

JUDGMENTS:—*Subrahmania Aiyar*, J.:—This is a suit by the 1st respondent for the recovery of two houses said to have been owned by his deceased paternal grandfather Vengappier who, it is alleged, purchased them in an execution sale in the name of his sister's son the appellant (the 1st defendant). The appellant contended in the Lower Court that having made the purchase with his own funds he was not a mere benamidar but the real owner. The District Judge finding the 1st respondent's version to be true overruled the plea that the suit was barred by S. 317 of the Code of Civil Procedure and gave a decree

* S. A., No. 780 of 1898. 22nd March 1899.

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to him. The vakil for the appellant urged that the said section did bar the suit. The argument is clearly untenable. There was no suggestion or proof in the Lower Courts that the properties were purchased by Vengappier with his own self-acquired funds and consequently the purchase must be presumed to have been made with funds belonging to the joint family of which the 1st respondent is the surviving member. That Section 317 of the Civil Procedure Code is inapplicable to suits like this follows from what was laid down in *Bhod Singh Doodhoonia* v. *Gunesh Chunder Sen*, 19 W. R., 356, cited for the respondent where the Judicial Committee held that the provision of the law in the Civil Procedure Code of 1859 corresponding to S. 317 of the present Code did not prevent a person in a position analogous to that occupied by the respondent from maintaining a suit in respect of property purchased *benamee* in an execution sale. Their Lordships pointed out that *benamee* purchases at execution sales cannot be taken to affect the rights of members of a joint Hindu family who by operation of law, and not by virtue of any private agreement or understanding, are entitled to treat as part of their common property an acquisition howsoever made by a member of the family if made by the use of the family funds. This principle was followed in *Natesa* v. *Venkataramayya*, I. L. R., 6 M., 135 and *Minakshi Ammal* v. *Kaliana Rama Aiyar*, I. L. R., 20 M., 349. *Natesa* v. *Venkataramayya* cannot, as urged for the appellant, be said to rest on fraud committed by the 5th defendant there—the certified purchaser—as against the coparcener who was the plaintiff. For, the report of the case shows distinctly that no specific fraud on the part of such purchaser was even charged by the plaintiff. As to the observations in *Rama Kurup* v. *Sridevi*, I. L. R., 16 M., 290, with reference to S. 317 of the Civil Procedure Code on which much stress was laid on behalf of the appellant, they seem to be not more than a *semble*. Be this, as it may, no reference is made in that case to the ruling of the Judicial Committee cited above or to *Natesa* v. *Venkataramayya*. And as intimated in *Meenakshi Ammal* v. *Kalyana Rama Aiyar*, it cannot be taken that in making those observations the learned judges intended to dissent from the view adopted in *Natesa* v. *Venkataramayyan*. No doubt as the policy of the Section in question is to strike at arguments relating to *benamee* purchases at execution sales, it is but right that a plaintiff who is an actual party to an

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agreement of that description or who claims through one who was a party thereto, should be disabled from maintaining a suit against the other party to the agreement or his privies. But it is not easy to see why the 1st respondent who himself did not enter into any such agreement and who, in strictness, does not claim through Vengappier, should be held to be precluded from proving the truth and recovering what belongs to him, as there is nothing whatever in the language of S. 317, C. P. C., to compel one to arrive at such a conclusion.

The second appeal fails and must be dismissed with costs.

Moore, J.:— I concur.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. S. Subrahmania Aiyar, Officiating Chief Justice, and Mr. Justice Moore.

Parameswaran Nambudripad and others. { Appellants (*Plaintiffs*)*

v.

Ammunni Nair and others ... ... { Respondents, (*Defendants.*)

Parameswaran Nambudripad v. Ammunni Nair.

Construction of Document—Counterpart—Copy—Unregistered counterpart, admissibility of.

In a suit to redeem certain lands from mortgage, a copy of the document from the Registrar's Office was tendered as secondary evidence of the deed of mortgage. Along with this another document was produced which was an exact copy of the mortgage document and the entries therein with this addition that the mortgagee finally signed the document which was designated a "Maruppattam.". This was written on a stamp paper of the same value as the mortgage but was not registered. The Court of First Instance allowed the plaintiff to redeem the plaint lands on payment of the amount mentioned in its decree. The Court of Appeal held that this latter document was a counterpart which was primary evidence against the mortgagee but that it was inadmissible for want of registration and dismissed the plaintiff's suit.

Held, that the suit was wrongly dismissed and that the plaintiff should have been allowed to redeem on proof that the lands were comprised in the mortgage.

Per *Subrahmania Aiyar*, J :—The document was not a counterpart, because not only the provisions of the mortgage deed but also the signatures of the mortgagor and other entries which would be altogether out of place in a counterpart had been transcribed into it. It was only a copy acknowledged to be correct by the mortgagee. Therefore secondary evidence was admissible.

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* S. A. 1818 of 1897 16th August 1899.

Per *Moore*, J :—The document was a counterpart and was inadmissible as evidence of mortgage. But it was admissible to show under what title the defendants entered on the lands. Since on the evidence of the document the defendant entered on the lands as mortgagee and there was no evidence of any subsequent assertion of absolute title, the defendants could not claim title to the properties by adverse possession.

The plaintiffs having established their title as jenmis, might recover the lands subject, however, to the payment of the sum of money admitted by them in their plaint to be due to the defendants.

SECOND APPEAL from the decree of the District Court of South Malabar in A. S. No. 32 of 1897 reversing the decree of the Subordinate Judge's Court of Calicut in O. S. No. 25 of 1895.

V. Bhashyam Aiyangar and *P. R. Sundara Aiyar* for appellants.

C. Sankaran Nayar and *T. M. Appu Nedungadi* for respondent.

The Court delivered the following

JUDGMENTS :—*The Officiating Chief Justice.*—The decision of the lower appellate Court rests entirely upon the view that Exhibit B is a counterpart of the Original of Exhibit A which was executed by the mortgagor to the mortgagee. That document, however, is, in my opinion, not a counterpart but only a copy of the document of which it is said to be a counterpart. This view is confirmed not only by the fact that the Exhibit in question is an exact transcript of the provisions of the document executed by the mortgagor but also by the entries which are to be found below that transcript and above the endorsement at the end of the document to be noticed later on. One part of these entries is "Padmanabhan-Mudra." *Witnesses,* "Signature Netiaparambil Nambiyathan Nambudri," "Signature Pattezhuth Ramen Nair," "Signature Kongathil Raman Menon," "Signature Parakkat Krishnan Nair." These of course refer to the signatures of the mortgagor and the attesting witnesses in the other document. Now suppose for argument that a counterpart is framed in the very unusual manner suggested for the respondents, *i.e.,* a transcript of the provisions of the document of which it is intended to be a counterpart with a clause added to the effect that the party signing thereunder agrees to bind himself by the terms and conditions recited in the transcript. Even in a document so framed, a

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reproduction of that part of the other document containing the signatures of the executant and the witnesses would be quite meaningless. Another of the entries referred to consists of the words. "Achati No. 5 of 1040." These words also have been copied from the other document. The corresponding entry in the latter was clearly meant to indicate that the transaction was the mortgagor's fifth transaction in that particular year. Surely one may ask what possible use there could be in repeating such an entry in a *counterpart*. The third and last entry to be noticed consists of the words "True copy—Marupattam." These words read together with the endorsment, referred to before, seem to show beyond doubt that the document is what I take it to be. For unlike the other two entries this one has not been copied into Exhibit B from the other document, but is a fresh entry purposely made with the unquestionable object of showing that it is not an original document by way of a counterpart but a copy only, acknowledged to be correct by the party who was to have possession of the original; such acknowledgment being shown by the endorsment which runs thus: "I, Blahayit Thachunni Nayar styled Raman Kandunni Ravi, signed this marupattam on the 26th Kumbham 1040." "Signature Sri Raman." That the term "marupattam" in such a context means not a counterpart but a copy of the document executed to another to be retained by the party executing it appears from the Appendix I to Wigram's Malabar Law, cited for the appellant where the term in question is paraphrased as an unsigned copy retained by a jenmi. To say that the said endorsement by itself evidences an agreement to be bound by the terms and conditions recited in the body of the document, would be plainly to substitute for what is in the document something absolutely different from it. The circumstance which was strongly urged in support of the view that the document is a counterpart, is that it is engrossed on a stamp of the value of Rs. 25. But under the law then in force a stamp of that value was not required for a counterpart, such as this is contended to be. That circumstance is, therefore, inconclusive, even if it be one which a court is at liberty to take into consideration when the language of the document is unambiguous and clear as I think it is here. No doubt, the document in question was left with the mortgagor in order that it may be used by him as evidence, if necessary, and it is in effect capable

of serving some of the purposes of a counterpart. But that is no reason for holding that it is a counterpart.

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As the result of the conclusions now arrived at, it is necessary to require the present District Judge to submit a finding upon the 3rd issue upon the evidence on record. If the finding is to any extent in favour of the defendants the District Judge should state distinctly how the Subordinate Judge's decree should be varied in respect of the description of the property to be redeemed.

Moore, J.:—The District Judge has, in my opinion, rightly held that Exhibit B is a counterpart of Exhibit A. The original mortgage document Exhibit A is signed by the mortgagor alone; the mortgagee has not joined in the execution of the document in any way or signed it in signification that he agrees to its terms and takes possession of the property under its provisions. Exhibit A is on a stamped paper of the value of Rs. 25. At the same time that Exhibit A was executed, Exhibit B was drawn up and it also is on a stamped paper of the value of Rs. 25. The whole contents of Exhibit A have been copied out in Exhibit B including the names of the mortgagor and the witnesses. Above the signature of the mortgagor the words "True copy, *Marupattam*" are to be found and underneath the names of the witnesses to Exhibit A as copied from that document is found the following entry "I Blahayil Thachunni Nayar styled Raman Kondunni Ravi signed this Marupattam on the 26th Kumbham 1040" (*i.e.* 17th March 1865). Then follows the signature of the mortgagee. The mortgagor has not signed Exhibit B. It is now urged that Exhibit B is not a counterpart of Exhibit A but merely a copy of that document. I cannot accept that view. Exhibit A may be looked on as both a lease and a mortgage and I believe it is very common in Malabar in drawing up the counterpart of such a document to copy out the terms of the original document and then enter certain words to show that the second document is a *Marupattam* or counterpart of the lease drawn up in the first document and that the lessee who signs his name to it and not to the original document agrees to hold under the terms there set forth. In such cases it is clear, however, that the second document is something more than a copy of the first document. In a similar manner on the East Coast it is common to find a *patta* drawn up and signed by the landlord alone while

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the *muchilika* consists of a copy of the *patta* with an endorsement signed by the tenant stating that he agrees to the terms set forth in the *patta*. It would in such a case clearly be incorrect to say that the *muchilika* is nothing more than a copy of the *patta*. If Exhibit B is nothing more than a copy of Exhibit A why is it described as a "*marupattam*"? The Pleader for the appellant seemed to contend that the word *marupattam* meant "copy." This is of course a mistake. In Gundert's Malayalam Dictionary *Marupattam* is defined as "a counterpart of a lease or deed executed by a tenant promising a certain rent." The word is one in every day use in Malabar and there can be no doubt as to its meaning. It is difficult to understand why if Exhibit B was merely a copy it should have been drawn up on a stamped paper of the value of Rs. 25. It is no doubt the case that in Exhibit B there is no endorsement by the mortgagee stating in distinct terms that he agrees to hold the land under the provisions of Exhibit A as there set forth, but I consider that the entry that is to be found there in which the mortgagee states that he has on the date of execution signed "this *marupattam*," *i.e.*, this counterpart of the lease or mortgage above recited, must be held to amount to such an agreement. The document was, it must be remembered, executed 33 years ago when people in Malabar were not as careful as to the terms in which documents like these were drawn up as they are now.

It does not, however, follow that because it is found that Exhibit B is a document the registration of which was compulsory under Section 13, Act XVI of 1864 the Suit of the plaintiffs should be dismissed. The plaintiffs sued on title as well as on their alleged mortgage and the Subordinate Judge has fouud that they have a *jenm* title to the land in dispute. The defendants also set up *jenm* title but the Subordinate Judge decided that they had completely failed to prove such title. The defendants are in possession and their plea that they hold a *jenm* title has been decided against them. On what right then are they holding? The Subordinate Judge has held, and I have no doubt, rightly that their late *karnavan* Thachunni Nayar duly signed the endorsement on Exhibit B to which I have already referred. That document cannot be received in evidence as against the defendants to prove the mortgage sued on but it can be admitted to show the manner in which their late

karnavan came into possession and the nature of the right that he then set up to the land. That right is clear from the document, was not an absolute or *jenm* right, but a right to hold as mortgagee and lessee. I cannot find that there is any clear evidence in the case to show that the defendants set up a *jenm* title to the land prior to the institution of this suit. They brought forward Exhibits IX to XXIII, dated as it would appear from 1806 to 1853, to show "dealings with the plaint lands" by them and their predecessors, but the Subordinate Judge has found that "such dealings" are in no way inconsistent with the case of the plaintiffs as it is admitted that the defendants have been in possession in some capacity for a lengthened period and as they have in none of these documents set up a *jenm* title. The defendants having been shown to have been in possession in 1865 under the plea of a right as mortgagees and it not having been proved that they have put forward a plea of *jenm* title adverse to the plaintiff for a period, of 12 years prior to the institution of this suit the plaintiffs are entitled to recover. The mortgage cannot be proved against the defendants by Exhibit B but as the plaintiffs in their plaint admit that they are bound to pay the amount set forth in Exhibit A a decree can be passed accordingly on the strength of that admission. I accordingly agree to the judgment and decree proposed by my learned colleague, although for different reasons.

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The finding called for should be submitted within one month from the date of the receipt of this order.

Seven days will be allowed for filing objections after the finding has been posted up in this court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Moore and Mr. Justice Michell.

Mallarkandi Imbi Chetti ... . Appellant * (*17th Defendant*).

v.

Narayana Menon and others .. Respondents (*Plaintiffs and other defendants*).

Malabar Law—Kanom—Waste—Forfeiture—Repayment of Kanom amount.

Mallarkandi Imbi Chetti *v.* Narayana Menon.

According to the custom prevailing in Malabar, wilful and extensive waste committed by a kanomder is a sufficient ground for the forfeiture of the kanom.

Where a Kanom is so forfeited on the ground of waste, the Kanomdar does not lose his right to recover the kanom amount or any renewal fees that he might have paid to the owner of the land. *Raman Nayar* v. *Kandapuni Nayar*, 1 M. H. C. R., 445 and *Mayavanjari Chumaren* v. *Nimini Mayuran*, 2 M. H. C. R., 109 referred to.

Second Appeal from the decree of the District Court of South Malabar in A. S. No. 112 of 1897 presented against the decree of the Court of the Additional District Munsif of Calicut in O. S. No. 948 of 1895.

This was a suit for the recovery of certain lands with damages. The 2nd plaintiff is the jenmi and the 1st plaintiff a *melcharth*-holder of the suit lands. The 2nd plaintiff had originally mortgaged these lands to one Ittukutti Amma for a sum of Rs 550-4. Subsequently under an agreement with the 2nd plaintiff to take the lands on kanom, the 1st defendant in conjunction with the 2nd plaintiff brought a suit for redemption against the said Ittukutti Amma which ended by the 1st defendant paying her the kanom amount minus the amount of rent due from her and himself stepping into possession of the properties as kanomdar. The 17th defendant purchased the right title and interest of the 1st defendant in execution of a decree against him and the other defendants in the case were in possession of the lands as his tenants. The plaintiffs based their suit on the ground that the defendants had committed extensive waste by digging clay from the lands and selling them to a tile manufacturing company at great profit and claimed damages to the extent of Rs. 473-10. The Court of first instance considered that the waste was not such as to cause a forfeiture of the kanom and dismissed the plaintiff's suit. On appeal, the District Judge

* S. A. 576 of 1898. 14th August 1899.

held that the waste committed was very serious, that thereby the kanomdar forfeited his right to hold the lands, and decreed the plaintiff's suit. He also decreed damages to the extent of Rs. 500 according to the finding of a Commissioner appointed for the purpose; but allowed a sum of Rs. 180 to the defendants, on grounds not clearly stated in his judgment. From that decision the 17th defendant preferred this second appeal. Mallarkandi Imbi Chetti v. Narayana Menon

C. Krishnan for appellant.

P. R. Sundara Aiyar and *C. V. Ananthakrishna Aiyar* for 15th respondent.

T. M. Appu Nedungadi for 14th respondent.

K. V. Karunakara Menon for 17th and 2 to 6 and 8 to 13 respondents.

The Court delivered the following

JUDGMENT:—The 17th defendant appeals, the main grounds put forward being that it has not been proved that any waste has been committed on the lands sued for, that even if there has been some waste it was not such as to justify a forfeiture of the appellant's right to hold the lands and further that granting for the sake of argument that there has been extensive waste yet that it has not been proved that any portion of that waste has been committed by the appellant and that he cannot be held to be responsible for waste committed by other persons. It is urged that there is no clear and distinct finding by the District Judge that the present appellant has committed waste. We observe that the District Judge has found (paragraph 3 of his Judgment) that the appellant has committed waste but it is pleaded that in this finding he has joined the 8th defendant with the 17th, that he has made no attempt to show to what extent each of these defendants is responsible, and that he has given a decree for damages against both of them jointly. This, it is pleaded, was irregular. This is a point that was not raised before the District Judge. In the memorandum of objections put in by the 17th defendant to the District Judge against the finding of the District Munsif on remand as regards waste, the question was not mooted. All that was pleaded was that the District Munsif had erred in holding that waste had been committed. The appellant never advanced the plea that although others might have committed

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waste, he had not done so and that he could not be held responsible for the acts of others.

It was proved by evidence that has been accepted in the Lower Courts that the first defendant whose rights the 17th defendant has purchased, the 3rd defendant his brother-in-law, and the 8th defendant who, it appears, held under the first defendant and had arranged to share his rights as to these lands with the 17th defendant, had committed extensive waste and it would appear as far as we can judge from the record that the 17th defendant made common cause with these defendants before the lower appellate Court and never put forward the plea that although they might have committed waste he had not done so and that he could not be held to be in any respect liable on account of their acts. We cannot consider here objections not raised in the lower Court.

It is next urged that even if it be found that extensive waste was committed it should not be held that the appellant has on that account forfeited his right to continue to hold the lands. There does not seem to have been any serious contention as to this before the lower Courts. On the contrary it would appear to have been taken for granted that according to the custom prevailing in Malabar if wilful and extensive waste was proved forfeiture would follow. There are not, as far as we can find, any reported decisions on this point. In Mr. Wigram's book on Malabar Law, p. 118, he observes that in various cases wilful waste has been held sufficient to work forfeiture of a kanomdar's right to continue to hold the land and he quotes two decisions of Mr. Justice Holloway passed by him when in Malabar to that effect. For the appellant no cases reported or otherwise have been cited in support of the contention now raised. We do not consider that we should be justified under these circumstances in interfering with the finding of the lower appellate Court on this question. It is finally urged that the appellant was entitled to a refund Rs. 550-4-0 being the amount of the Kanam held by Kutti Amma whose claims, it is admitted, were paid in full by the 1st defendant whose rights the appellant has purchased, that the amount of damages awarded is excessive, that the respondents are not entitled to recover on that account any sum above Rs. 473-10-0 as claimed by them in their plaint and that the appellant should also be paid the amount (Rs. 170) given by the 1st defendant to the 2nd plaintiff as renewal fees. We do not understand why the plaintiffs have

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not been called on by the lower appellate Court to refund to the appellant the amount of the kanom paid off by that defendant. It cannot be held that he has in consequence of the waste committed on the property forfeited the right to this refund. A reference to *Raman Nayar* v. *Kandapuni Nayar*, 1 M. H. C. R., 445 and *Mayavanjari Chumaren* v. *Nimini Mayuran*, 2 M. H. C. R., 109 shows that even in the cases reported there where the kanamdars had denied the title of their landlords and had in consequence lost their right to hold for 12 years it was not held that they had forfeited the amount of their kanoms. The 1st defendant having paid off the amount of a kanom due to Ittukutti Amma would have been entitled to a refund of that sum and the appellant who has purchased all his rights must accordingly be held to have a claim to whatever sum was due to Ittukutti Amma when her kanom was paid off. We do not consider that the District Judge was justified in awarding to the plaintiffs a greater sum on account of damages than that which they claimed and we shall accordingly reduce the sum awarded under this head to Rs. 473-10. We are not able to ascertain clearly if the Appellate Judge has decided that the appellant is entitled to a refund of the amount paid by the 1st defendant to the 2nd plaintiff as renewal fees. He has allowed him a sum of Rs. 180 in his decree, but has not stated on what account this amount is awarded. We are clearly of opinion that as it has been proved that a fresh kanom has not been granted by the 2nd plaintiff to the 1st defendant as promised by him he is bound to refund the renewal fees received by him. In the plaint it is admitted that the 2nd plaintiff received from the 1st defendant Rs. 240 on account of the expense of the demise. Whether this was all paid on account of renewal fees is not clear. When examined as a witness before the District Munsif (*Vide* paragraph 21 of his judgment) the 2nd plaintiff stated that he received Rs. 173 from the 1st defendant as renewal fees. All that the appellant however claims in his appeal petition is Rs. 170 and this sum will, therefore, be awarded to him. There appears to be some doubt as to the amount that the appellant is entitled to receive on account of Ittukutti Amma's kanom. The original sum seems to have been Rs. 550-4-0, but it is urged on behalf of the respondents that a considerable portion of this amount was absorbed on account of unpaid rent and that what is now due is far less than Rs. 550-4-0. There is no finding by the District Judge as to the

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amount still due on account of this Kanam and we must accordingly call on him to return a finding on the following issue on the evidence on record.

To what amount is the appellant (17th defendant) entitled on account of Ittukutti Amma's kanom? The finding is to be submitted within one month from the date of the receipt of this order and seven days will be allowed for filing objections after the finding has been posted up in this Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Boddam and Mr. Justice Michell.

Tulasamma ... ... Appellants * (1*st Defendant*)

v.

Venkatasami ... ... Respondent (*Plaintiff*).

Tulasamma *v.* Venkatasami

Hindu law—Widow's maintenance—Personal undertaking to pay by one member of the joint family—subsequent partition—claim by the person to be exonerated from his undertaking.

Where a member of an undivided family to which property had passed by survivorship on the death of a member of the family, personally undertook to pay the maintenance of the widow of the deceased, he cannot be exonerated from his liability to pay any part of the maintenance by reason of a subsequent partition among the different members of the family. The proper course is to make the widow entitled to maintenance a party to the partition suit and to make a provision for her in the course of that suit.

Second appeal from the decree of the District Court of Bellary, in A. S. No. 202 of 1897 affirming the decree of the Court of the District Munsif of Gooty in C. S. No. 258 of 1897.

A widow brought a suit for maintenance against the two surviving members of her husband's family to whom the property had lapsed by survivorship. The suit was compromised by the undertaking of the senior member to pay her maintenance. Then the junior member brought a suit for partition and obtained a decree. For three years after the date of this partition the senior member paid the widow her maintenance. He now brought this suit to have the compromise decree set aside, to declare that he was liable to pay only half the amount settled and to recover from the junior member half the amount paid by him for the three years before the date of suit. The Court of First Instance and the Court

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* S. A. 570 of 1898, 11th August 1899.

of Appeal set aside the compromise decree and declared that the plaintiff was bound to pay only half the amount. Hence this appeal by the widow. Tholasamma v. Vekatasami.

C. Sankaran Nayar and *M. A. Parthasarathy Aiyangar* for appellant.

T. V. Seshagiri Aiyar for respondent.

The Court delivered the following

JUDGMENT:—We think the decree of the lower Court is wrong and should be set aside. The suit was brought by the plaintiff to set aside a Razinama decree whereby the plaintiff had become personally liable to pay maintenance to the 1st defendant, his brother's widow for her life.

Since the decree a partition suit had been brought by the 2nd defendant, his nephew, against the plaintiff and the property had been divided. It appears that in that suit the 1st defendant was not made a party and nothing was said about the plaintiff's liability under the Razinama decree to pay her maintenance. For 3 years after the decree in the partition suit the plaintiff had continued to pay maintenance to the 1st defendant under the Razinama decree, but he now sues to set aside that decree and to have a declaration that he is no longer liable under it to pay maintenance to 1st defendant and to recover from the 2nd defendant the amount of maintenance he has paid to 1st defendant since the partition suit.

Both courts varied the Razinama decree by making the plaintiff only liable to pay half the amount of the maintenance and dismissed the plaintiff's claims against the 2nd defendant. The 2nd defendant is not made a party to the appeal. It is, however, contended by the 1st defendant, the appellant, that this decree is wrong, that the Razinama decree should not be set aside merely because of what occurred between the plaintiff and the 2nd defendant in the partition suit. It is not suggested that there was any fraud, mistake or coercion in obtaining the Razinama decree and if any change should have been made in her maintenance it ought to have been made in the partition suit to which she should have been a party.

Without laying down any general rule with respect to decrees for maintenance whether Razinamas or those of the court, we are

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of opinion that the circumstances of this case are not such as to entitle the plaintiff to have the Razinama decree set aside in whole or in part.

We must, therefore, allow this appeal and reverse the decree in the Court below and dismiss the plaintiff's suit with costs throughout.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Boddam and Mr. Justice O'Farrell.

Ashtamurti Nambudri and others ... Appellants * (*Plaintiffs*),

v.

Raman Menon and others ... Respondents (*Defendants*).

Ashtamurti Nambudri v. Raman Menon.

Practice—Devasom—Uralars—Parties to Suit—Non-joinder.

A suit by a Uralan of a Devasom without making the other Uralars parties is bad for non-joinder of necessary parties and should be dismissed.

A Uralan who wishes to bring a suit should invite the other uralars to join him as plaintiffs in the suit and if they refuse to do so, should then join them as defendants.

Second Appeal from the decree of the Subordinate Judge's Court of South Malabar, Palghat, in A. S. No. 389 of 1897, affirming the decree of the District Munsif of Nedunganad, in O. S. No. 285 of 1896.

C. Sankaran Nair and *T. M. Appu Nedungadi* for appellants.

P. R. Sundara Aiyar for 2nd and 4th respondents.

The Court delivered the following

JUDGMENT:—The ownership of the property of a devasom is vested in the Uralars all of whom should sue jointly. Where, however, some of them decline to join as plaintiffs they may be made defendants, but in every case they should all be invited to join as plaintiffs, and if a suit is brought by some Uralars without joining the others as plaintiffs or inviting them to join as plaintiffs the suit is bad for non-joinder (See *Parameswaran* v. *Shangaran*, I.L.R., 14 M., 489). That is the present case which was, therefore, properly dismissed. The second point was never raised in the Courts below.

The second appeal is dismissed, the memorandum of objections is also dismissed.

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* S. A. 1142 of 1898. 4th September 1899.

Musalareddi v. Ramayya.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. S. Subrahmania Aiyar, Officiating Chief Justice, and Mr. Justice Michell.

Musalareddi and another ... ... Appellants.

v.

Ramayya and others ... ... Respondents.

Civil Procedure Code, Ss. 365 and 366—Death of appellant—Two out of four representatives substituted for appellant—The other two made respondents after time—Abatement—Limitation Act, Art. 175 A—Hindu Law—Mortgage by widow—Suit after her death—Money advanced to discharge prior debt of widow—Binding character of debt—Inquiries.

All the legal representatives of a deceased appellant should, if possible, join in the application to the court to be made parties in place of the deceased. But if, by reason of the ignorance of the existence of other representatives or of the unwillingness of some of them to join in the application or of the *bona fide* belief, on the part of some, of exclusive title, or for any other like cause they are not able to join, those who agree may apply, within the period limited by Art. 175 A of the Limitation Act, to be made parties so as to save the proceedings from abatement under S. 366, C.P.C.

Bhikaji Ramachendra v. *Purshotam*, I. L. R., 10 B., 220 and *Ghamandi Lal* v. *Amir Begam*, I. L. R., 16 A., 211 considered.

In a suit brought after the death of a widow for the recovery of money due upon a mortgage executed by her for the purpose of discharging a debt created by herself:—

Held that the lender was bound to make some inquiries as to the origin and character of the debt for the discharge of which he was advancing money and that if such inquiries would have shown that there was no debt or at all events no such debt as would bind a reversioner, the creditor could not recover the money from the persons on whom the property has devolved.

Second appeal from the decree of the Subordinate Judge's Court of Kistna in A. S. No. 472 of 1896 reversing the decree of the District Munsif's Court of Bapatla in C. S. No. 47 of 1895.

The facts appear from the judgment of the Court.

T. Rama Rao for appellants.

K. Narayana Rao for 2nd, 3rd and 8th respondents.

The Court delivered the following

JUDGMENT:—The first contention raised on behalf of the appellants (plaintiffs) before us is that, as the appellant in the

* S. A. 1275 of 1898. 12th September 1899.

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appeal to the Lower Appellate Court, Seshamma (2nd defendant) died during the pendency of that appeal and the two persons who applied within the time limited by Art. 175 A, Schedule II, Act XV of 1877, for applications under Sections 365 and 582 of the Civil Procedure Code, to be made appellants in her place as her legal representatives, admitted in their applications that there were two other sapindas of her deceased daughter's son (the last male holder) of equal degree with themselves, but did not within the time so limited apply to have those two other sapindas made co-respondents (the latter not having joined with the appellants in their application to be made appellants), the appeal to that Court therefore abated, and that Court ought to have accordingly dismissed it. The facts are these:—The appeal to the Lower Appellate Court was presented by Seshamma on 9th July 1896. On some day in July 1896 not specified she died. On 14th September 1896 the persons who are 2nd and 3rd respondents in this second appeal applied to be entered on the record in place of the deceased appellant and their application was granted. In this application they stated that there were two other sapindas of equal degree with themselves to the late Sivaramiah, the deceased husband of Lakshmidevi, the deceased daughter of Seshamma, but that these two other sapindas had not joined them in making the application, "having all along colluded with persons who set up a forged will and false adoption against the title of the late Seshamma and having been ordered to be prosecuted for offences committed by them in the litigation against Seshamma." Nothing further appears to have been done till 3rd December, 1897, when the plaintiffs, as respondents before the Lower Appellate Court, presented a petition, praying that the appeal might be dismissed as having abated by reason that the substituted appellants (in that Court), though admitting that there were two other legal representatives of Seshamma besides themselves, had not joined them as parties to the appeal. On 4th December 1897 the substituted appellants presented another application to the Lower Appellate Court in which, after referring to their former application, they stated that on the authority of *Bhikaji Ramchendra* v. *Purshotam*, I. L. R., 10 B., 220, they did not consider it necessary to apply to have the said other two sapindas made parties to the appeal, but that if the decision in *Ghamandi Lal* v. *Amir Begam*, I. L. R., 16 A., 211, was considered to be a

correct exposition of the law, they prayed that the two other persons mentioned in their former petition might be made parties; that their omission to make this request did not arise from any negligence on their part, but from a *bona fide* belief that the representation by them was sufficient; and that as the point did not appear to have been authoritatively settled by any decision besides the two mentioned, the delay was excusable under Section 5 of the Limitation Act. The Subordinate Judge was of opinion that with reference to the terms of Section 366 of the Civil Procedure Code an application by one or some of several representatives of a deceased plaintiff or appellant if made within the prescribed period was sufficient to prevent an order of abatement being made under that Section, and that he ought to follow the Bombay decision rather than the Allahabad decision. He, therefore, refused to pass an order of abatement; but being of opinion that all the representatives must be brought on the record, he directed under Section 32, Civil Procedure Code, that the two legal representatives of the deceased who had not been brought on the record should be made co-respondents.

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Though in Art. 175 A, Schedule II of the Limitation Act, the application is expressed to be an application under Section 365 of the Code, and Section 366 is not mentioned, yet for the purpose of considering the question of abatement the two Sections 365 and 366 must, we think, be read together. In the Allahabad decision above referred to, no reference is made to Section 366. It is Section 366 which contains the provision as to abatement, and that section provides that "if within the time limited by law no such application be made to the Court by any person claiming to be the legal representative of the deceased plaintiff, the Court may pass an order that the suit shall abate". The Bombay High Court in the case above referred to construed the words "any person claiming to be the legal representative" in Section 366 as meaning any person claiming to be the, or (where there is more than one) a, legal representative of the deceased. The Bombay case is not referred to in the judgment in the Allahabad case above cited. In the Allahabad case the learned Judges held that when an appellant dies during the pendency of the appeal, leaving more than one legal representative, all the representatives or all those who are willing to join in the application must apply to be made appellants in place of the

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deceased appellant within the limitation period, otherwise the application is barred and the appeal abates. They were of opinion that the application being to carry on the appeal, the appeal could only be carried on by those who represented the deceased appellant's interest in its entirety, and that an application for bringing on the record a person or persons who represented only a share or shares in, but not the entirety of, such interest was therefore not an application within the meaning of Section 365 of the Civil Procedure Code. If an application is made to bring on the record only one or some of two or more heirs of the deceased appellant then though he or they might be capable of representing their respective shares in the estate of the deceased, they would not, it was considered, represent the interest of the deceased, in whose place they sought to be substituted in the appeal. "In Section 365", the Court said in their judgment "the words 'the legal representative,' must, when there are more than one legal representative, be read in the plural."

It does not appear that in that case the two co-heirs of the deceased appellant who did not join with the heir who made the application under Section 365 were unwilling to join with him in that application, and therefore that case differed, in that respect, from the present case. It is true, however, that the Court went on to say in their judgment: "It might be that one only of the legal representatives of a deceased appellant was willing to carry on the appeal. In that case that legal representative should make the other legal representatives parties to the appeal as respondents, if they refused to join as appellants, so that the Court might have before it all the persons whose interests might be affected by the decree in appeal. The legal representatives of the deceased appellant not having been brought upon the record in the Court below within time, or at all, the appeal below abated, and an order to that effect should have been made." These observations were therefore *obiter*, and we cannot take this as amounting to a decision that in such a case as the supposed case there referred to, which is such a case as the present, if the recusant legal representatives are not brought on the record as respondents within the period limited for an application under Section 365, or at all, the application is no application within the meaning of the section or is barred and the appeal abates.

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We so far agree with the learned Judges in the Allahabad case that we think, when there are more than one legal representative of a deceased appellant, all those representatives must, so far as it is possible for this to be done, join in the application under Section 365 and that the words "legal representative" in Section 365 (and similarly the words "any person" and "the legal representative" in Section 366) strictly construed, must, in such a case, be read in the plural and as including all the legal representatives. But if their observations above quoted can be taken to mean that, in the opinion of the learned Judges, if, in such a case, one or some of the representatives refuse to join in the application, then unless the recusant representative or representatives be joined by the Court, or application to join them be made, within the time limited for an application under Section 365 the application which has been made is no sufficient application within the meaning of Sections 365 and 366 or is barred and the appeal abates, we are unable to concur in that view. It is clear that there may be cases in which where there are more than one representative Sections 365 and 366 cannot, assuming that the words "legal representative" must then be read in the plural and so as to include all the representatives, be strictly complied with, that is to say all the representatives cannot be joined as applicants in the application. One of such cases would be that in which the representative or representatives applying within time is not aware of the existence of one or more other representatives who in fact exists or exist. Another is that in which one or some of the representatives apply within time, but one or more other representatives have refused to join in the application or to make a separate application themselves. In neither of these cases is it possible for the applicants to comply with the terms of those sections, if they are construed, strictly, as meaning that all those who represent the entire state of the deceased appellant must "apply to the Court." We cannot think that in such cases, those sections should be construed to have the effect of rendering the application no application by "the legal representative" and therefore no application within the meaning of the sections, so that the appeal must be held to have abated. The learned Judges of the Allahabad Court appear to admit that, in the case of one or some only of the legal representatives applying, another or others refusing to join, if such other or others be joined as a respondent

or respondents or at all events if such joinder be made within the limitation period, the sections are complied with. Yet that is an admission that the terms of the sections need not always be strictly or to the letter complied with, for in that case all the legal representatives (the words "the legal representative" being required by the hypothesis, to be read in the plural and so as to include all those representing the entire estate of the deceased appellant) have not applied to the Court. It is departing from a literal construction of the section, but putting upon them a construction which, regard being had to the subject-matter is, the learned Judges apparently admit, a legitimate construction and one in accordance with the principles governing the construction of statutes.

Again, an applicant or applicants under Section 365 might believe that he or they were the only legal representatives and *bona-fide* deny a right set up by some other claimant or claimants and therefore not attempt to join them in the application, yet it might be found subsequently by the Court (see Section 367) that such claimant or claimants were also legal representatives, and should therefore also have been joined in the application or sought by the applicants to be made respondents. We do not think it could have been intended to put the question of the representation of a deceased plaintiff or appellant for the purpose of carrying on a suit or appeal upon the extremely hazardous footing which would result from the strict literal construction of Sections 365 and 366 contended for by the appellant's counsel in this second appeal.

We are, therefore, of opinion that, in the present case, in which two out of the four legal representatives of the deceased appellant have applied under Section 365 within time and the other two have not joined in the application owing to their unwillingness to do so and to the other reasons stated above, and the applicants have subsequently, but, in consequence of a *bona-fide* belief, as we see no reason to doubt, entertained by them, that it was unnecessary for them to do so, not within the time limited by law for an application under Section 365, applied to have the other two brought on the record as respondents, we are not unduly straining, or rather perhaps we should say relaxing, the terms of Sections 365 and 366, but placing on them a construction which, having regard to the subject-matter, is one in accordance with the principles governing the construction of statues, if we hold as we do, that the application

to the Lower Appellate Court of the 14th September 1896 was an application fulfilling the requirements of those sections, and that the appeal before that Court therefore did not abate.

It was not disputed that the applicants, the 2nd and 3rd respondents in this second appeal, as reversionary heirs to the last male holder, are legal representatives of the deceased appellant before the Lower Appellate Court, Seshamma, within the meaning of Sections 365 and 366, nor was there any room for questioning this. (*Katama Nachar v. Rajah of Shivaganga*, 9 Moore's I. A., 539; *Premmoyi Choudhrani and another v. Preonath Dhur and another*, I. L. R., 23 C., 636; *Tribhuwan Sundar Kuar v. Sri Narainsingh*, I. L. R., 20 A., 311.)

The next and only other contention urged in this second appeal relates to the merits of the case. The suit was brought against the minor 1st defendant (the alleged adopted son of Lakshmidevi but whose alleged adoption the Subordinate Judge says there was no attempt on the part of either party to rely on as valid, and who has allowed the suit to proceed *ex-parte* as against him) and the other defendant, Seshamma, to enforce a mortgage executed by Seshamma's daughter, the late Lakshmidevi, in favour of 1st plaintiff's late brother and manager of their family, and 2nd plaintiff, dated 2nd March 1886. The plaintiffs were bound to show that the mortgage was executed under circumstances rendering it binding on the reversioners. So far as the question whether it was so executed was a question of fact, the decision of the Lower Appellate Court thereon cannot be called in question in second appeal. But it is contended that the Lower Appellate Court was wrong in considering that the plaintiffs were bound to ascertain the nature of the original debt contracted by Lakshmidevi, in connection with which the mortgage sued on was executed, and also that due legal effect was not given to certain of the documents filed or they were not properly construed. Exhibit A, the mortgage sued on, purports to have been executed by Lakshmidevi, for the purpose of paying off, with the sum advanced, Rs. 1,000, the debt due by her under a decree obtained by one Chowdari against her in Suit No. 5 of 1886 and in execution of which decree a sale proclamation for the sale of the same property which was mortgaged by Exhibit A had been issued (Exhibit H). Chowdari's suit was brought on a mortgage of the same property for Rs. 800 executed by Lakshmidevi in his

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favour on 21st March 1885 (Exhibit K). Exhibit K was executed in connection with, and on the same date as, that of a razi decree passed in Suit No. 71 of 1884 (Exhibit C). That was a suit brought by Lakshmidevi against Chowdari for recovery of certain land said to have been sold by the latter to her late husband Sivaramaiya. That land was part of certain lands purporting to have been sold by Lakshmidevi to one Perinidu by the document Exhibit II, dated 10th February 1883. By this document she purports to sell the lands to him for Rs. 4,500, made up thus: Rs. 3,000 due on settlement of accounts between them in respect of dealings between him and her late husband; Rs. 500 already received by her from him for expenses of her late husband's obsequies, for discharge of urgent debts which she had to repay, and for other purposes; Rs. 500 received then for assessment, discharge of debts and other purposes; and Rs. 500, amount of document then executed by him to her agreeing to pay her Rs. 25 per month as maintenance for 20 years. It was found by both the Lower Courts that this sale deed, Exhibit II, represented a nominal transaction. In Suit No. 71 of 1884 Perinidu intervened and claimed under Exhibit II the land for recovery of which that suit was brought. In the razi decree, Exhibit C, one of the stipulations was that Chowdari agreed to pay Rs. 625 to Perinidu at Lakshmidevi's request out of the amount of the mortgage bond (K) for Rs. 800 then executed by her to Chowdari. It has been found by the Subordinate Judge, on a consideration of Exhibits II and C and the other evidence bearing on the question, that there was no debt due to Perinidu by Sivaramaiya, and that Lakshmidevi did not agree to pay Perinidu Rs. 625 in discharge of such debt. The sum, Rs. 800, for which (K) purports to have been executed is stated therein to have been advanced, or rather given credit for, to Lakshmidevi, partly for the discharge of this alleged debt to Perinidu of Rs. 625, and partly, that is, as to the remaining Rs. 175, towards payment by him to her pleader of a sum of Rs. 200 for costs of the suit, a pronote being executed by her in Chowdari's favour for the remaining Rs. 25. The Subordinate Judge observes with reference to this that the value of the suit being only about Rs. 90 and the regulation fee for the pleader only about Rs. 5, such a high remuneration to the pleader as a payment of Rs. 200 must have involved,

even if he had to pay thereout costs, if any, incurred by his client, would not be binding upon the estate so far as the interests of reversioners are concerned, and we agree with him in regard to this. The razi decree provided that each party should bear his own costs of the suit. The Subordinate Judge has correctly summarized in his judgment the contents of the razi decree, and we agree with him in thinking that a persual of it ought to have set plaintiffs on their guard, as being suspicious as disclosing the fact that while the whole of the land which Lakshmidevi purported to sell to Perinidu for Rs. 4,500, by Exhibit II was to be made over to her as being entitled to it, the consideration money, Rs. 4,500 was reduced to Rs. 625, as being all that Perinidu was entitled to, and we agree with the Subordinate Judge that these provisions in Exhibit C were such as to make it incumbent on plaintiffs to enquire into the previous transactions with reference to which that razinamah purported to have been made and more especially the alleged sale represented by Exhibit II; and if they had made such inquiry they would have discovered that Exhibit II was obtained by Perinidu from Lakshmidevi without any consideration either paid by him or proved to have been due by Sivaramaiya to him. The plaintiffs have not proved any debt to have been due by Sivaramaiya to Perinidu. Even as to the Rs. 625 which by the razi decree it was arranged that Perinidu was to get from Lakshmidevi, Perinidu did not substantiate any legal right to it. Plaintiffs' 3rd witness Chowdari said "Sivaramaiya did not borrow any money during his lifetime. He was a rich man. That was a rumour. * * * * * As Sivaramaiya deceived Perinidu to a large extent, the latter took hold of the nominal sale-deed and did not give it up until Rs. 625 were paid." The only witness who gave any evidence as to any enquiry having been made before the plaintiffs took their mortgage was 1st plaintiff, who is not one of the mortgagees, and he admits that he made no enquiry beyond seeing the razinama decree; that he did not see the documents upon which Lakshmidevi was alleged to be indebted to Perinidu nor ascertain the details of Perinidu's and Chowdari's alleged debts. In short, he in no way tested the *bona fides* of the transactions set forth in Exhibit C, though on their face dubious and suspicious. It has not been shown to us that any of the exhibits have been misconstrued or given a wrong legal effect to by the Subordinate Judge.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Boddam.

Vikram Deo ... ... Petitioner (*Defendant**).

v.

Papayamma and another ... ... Respondents (*Plaintiffs*).

Vikram Deo *v.* Papayamma. — Boddam, J.

Jurisdiction—Agency Court—High Court—Appellate Jurisdiction—Right of the High Court to transfer a suit from Agency to District Court—Charter Act, S. 15.

Within the meaning of S. 15 of the Charter Act, the High Court has appellate jurisdiction over the Agency Court and the Agency Court is not a Court of jurisdiction superior to that of the District Court. The High Court may, under the said section, transfer a suit from the file of the Agent's Court to that of the District Court.

Per Curiam: [Section 4 of Act XXIV of 1839 which authorises the Government to make rules for guidance of Agents does not preclude the High Court from making rules under section 15 of the Charter Act to regulate the practice and proceedings of the Agents' Courts.

The Governor in Council is not authorised by section 4 to constitute any other appellate Court than the Sudder Court and rule 22 which provides that an appeal shall lie to the Governor in Council in the circumstances mentioned therein, is *ultra vires* and illegal.]

Application praying that, in the circumstance stated therein, the High Court will be pleased to review and reverse the order of this Honourable Court on C. M. P. No. 455 of 1898, dated 30th September 1898, transferring O. S. No. 1 of 1898 from the file of the Vizagapatam Agency Court to the District Court of Vizagapatam for disposal.

This suit was first instituted in the Court of the Vizagapatam Agent. The Agent having been connected with the case in his executive capacity considered that it would be well if the case were transferred to the District Court of Vizagapatam and wrote to the High Court of Madras so to transfer the case. The High Court transferred the case accordingly. The present petition is to review this order of transfer on the ground that it was illegal.

V. Bhashyam Aiyangar for petitioner.

N. Subrahmanyan and *C. Krishnan* for respondents.

N. Subrahmanyam for counter-petitioner. This application is out of time. The original order of transfer was passed more than 90 days before the date of this application. It ought to be dismissed.

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* C. M. P. No. 422 of 1899. 12th September 1899.

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V. Bhashyam Aiyangar for petitioner: My contention is that the High Court had no jurisdiction to make the transfer. If I am right in that contention, the court can cancel the order *suo motu*. Therefore there is no question of limitation. Even if it were held to be strictly a case of review, this is a fit case for excuse under S. 5, Limitation Act. [*Boddam*, J. If you satisfy me that the court had no jurisdiction, I shall entertain the application notwithstanding that it was put in more than 90 days from the date of the order.] Now going into the case, admittedly the Civil Procedure Code has no application, for the Agency jurisdiction is part of the Scheduled Districts to which the Act XIV of 1882 does not apply. Then the transfer must have been made under S. 15, Charter Act. [Read Charter Act, S. 15.] For the application of this section there are two requisites. The High Court must have appellate jurisdiction over the Agent's Court from the file of which the case has been transferred by the High Court. Secondly, the District Court of Vizagapatam to which the case was transferred must be of jurisdiction equal or superior to that of the Agent's Court from which the transfer was made. Both these conditions fail in this case and the transfer is invalid on both grounds.

One test of whether the High Court is the Appellate Court is whether the High Court can make rules to regulate the procedure of the Agent's Court. This test is clearly suggested by the latter part of S. 15, Charter Act. In the light of this test, the High Court clearly is not the appellate Court. Act XXIV of 1839 deals with the Agency Courts. Under the Act civil administration is vested in the Collector or the Governor's Agent. The Government is authorised by the Act to make rules for regulating the procedure of such courts. Accordingly rules have been framed by the Government. Rule 10 provides that ordinarily the Agent should take cognisance of cases of the value of Rs. 5,000 and more. Rule 21 says that there is to be an appeal to the Sudder Court within three months. There is an exception to this rule. The exception is when the Zamindar's landed possession forms the subject of litigation. Then the appeal lies to the Governor in Council who might refer the matter to the High Court. Under these rules, therefore, the High Court hears appeals from Agents in some cases not because it has appellate jurisdiction over the Agent's Court but because the Government has authorised the High Court to hear the appeals. Whatever may be the view as to ordinary cases, this case at all events falls under the exception and the appeal in the usual course lies not to the High Court but to the Governor in Council. The High Court, therefore, is not a court having appellate jurisdiction over the Agent's Court.

The Agent's Court is of jurisdiction superior to that of the District Court. Its jurisdiction presents more analogy to that of the High Court than to that of the District Court. The Agent hears second appeals from the decision of the Divisional Assistant on appeal from the Tehsildars (see rule 17). The Agent who usually takes cognisance of suits of the value of 5,000 and more, may refer such cases to the Divisional Assistant. Then the appeal from the decision of the Assistant will lie to his court. He thus hears appeals in suits involving subject matter of more than Rs. 5,000 Again like the High Court he revises the orders of the lower Courts. The Agent gives power to the Courts below to review their own orders. Lastly, the appellate decisions of the Agent are final.

To summarise, the power of making rules for Agent's Court is vested in the Government and not in the High Court. The High Court is not, therefore, an appellate Court. Even if that argument fails in regard to ordinary cases this case falls under rule 22 and the High Court is not the appellate authority in such cases at least. Agency Courts being of superior jurisdiction the High Court ought not to have transferred the case to the District Court.

N. Subramanian for counter-petitioner: The action has already been delayed. This petition is an attempt to delay it further. The order transferring the case to the file of the District Court is correct. The suit may no doubt be transferred to the Assistant, but the appeal will lie to the Agent and then his decision will be final.

The rules framed by the Government make the Sudder Court the appellate Court. That in some cases no appeal lies to High Court is no test of the independence of Agent's Court any more than the non-appealability of small cause decisions, of the independence of Small Cause Courts. S. 4 of the Act moreover authorises the Government to say when appeal lies to Sudder Court and when not. The Government has no right to hear appeals and a portion of the rules framed seems *ultra vires*. [*Boddam*, J. Can High Court make rules regarding the procedure of Agent's Court ?]. Yes, the High Court may. [*Boddam*, J. Can the High Court overrule the rules framed by the Government ?] They cannot, they may make rules not inconsistent with the rules framed by the Government.

Next the comparison between the two courts should be made, only of original jurisdiction. Both are equally of unlimited jurisdiction. The District Judge has insolvency jurisdiction which the Agency Court has not. The transfer was rightly made. This petition should be dismissed.

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V. Bhashyam Aiyangar in reply: The contention that the High Court is the appellate Court is a mistake. The Government has made rules under the powers given by the Act. The rules framed are not *ultra vires*. It is long since the rules were framed. Nobody has questioned the validity of the rules so framed. The High Court has always guided itself by them nor has the legislature chosen to interfere with them. As to the other question it is wrong to say that only the original jurisdiction should be compared. The jurisdiction of a Court depends upon the constitution of the Court and is one and indivisible. We are called upon not merely to compare one aspect of their various functions but to compare the jurisdiction of Courts as a whole. It was suggested that the District Court was really of superior jurisdiction having power to adjudicate insolvency cases. But we ought to make a distinction between jurisdiction conferred on the Court by its constitution and jurisdiction annexed to it. New enactments may utilise the existing Courts for carrying out the purposes of the Act. In comparing the jurisdictions of two Courts we ought not to take into account these extraordinary duties of Courts. Such are insolvency and probate jurisdictions. The inherent powers of Courts as determined by their constitution ought to be compared. The District Court accordingly is of inferior jurisdiction. The transfer is, therefore, invalid and ought to be set aside.

The Court made the following

ORDER :—This is an application for the review and reversal of my order of the 30th September 1898, transferring Original Suit No. 1 of 1898 from the file of the Vizagapatam Agency Court to the District Court of Vizagapatam for disposal. That order was made at the request of the Agent and by consent of the parties, but it is said now that this Court had no jurisdiction to make the order and I have therefore heard the arguments even though the application for review is very much out of time the petition having been presented only on the 17th April 1899.

The question turns on the 15th Section of the Act for establishing High Courts in India, 24 and 25 Victoria, Chapter 104.

So much of Section 15 as is material is follows:—" Each of the " High Courts established under this Act shall have superintendence " over all Courts which may be subject to its appellate jurisdiction " and shall have power to call for returns and to direct the transfer of " any suit or appeal from any such Court to any other Court of equal " or superior jurisdiction and shall have power to make and issue

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"rules for regulating the practice and proceedings of such Courts," etc.

It is contended that this Court had no jurisdiction to make the order because (1) the Agency Courts are not subject to the appellate jurisdiction of the High Court and (2) the District Court at Vizagapatam is not of equal or superior jurisdiction to the Agency Courts.

It is admitted that the Civil Procedure Code, Section 25, does not apply as the Court in question is in a scheduled district within section 1 of the Civil Procedure Code.

The Agency Court is created under Act 24 of 1839, "An Act for the administration of justice and collection of revenue in certain parts of the districts of Ganjam and Vizagapatam."

By Section 4 of this Act it is enacted that it shall be competent to the Governor-in-Council of Fort St. George by an order in Council to prescribe such rules as he may deem proper for the guidance of such Agents . . . and to determine to what extent the decision of the Agents in civil suits shall be final and in what suits an appeal shall lie to the Sadr Adalat," &c.

Rules were passed by the Governor in Council under this section and rule 21 of such rules provides that from all decrees upon original suits passed by the Agent (with the single exception specified in the next following rule) an appeal shall lie to the Sadr Court, &c., and rule 22 provides that "from decrees of the Agent "in suits wherein the landed possession of Zamindar, &c., may have "formed the subject of litigation an appeal will lie to the Governor "in Council alone who may refer any such appeal for the decision "of Sadr Court," &c.

Now the suit in which this present application is made is within this rule and any appeal would under this rule be to the Governor in Council alone; so that under these rules in this very case the appellate jurisdiction is not in the High Court. It is therefore contended that the Agency Courts are not subject to the appellate jurisdiction of the High Court within Section 15 of the Charter Act.

Another reason for this contention is that under the Act establishing the Agency Courts the Governor-in-Council of Fort

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St. George is authorised to prescribe such rules as he may deem proper for the guidance of the Agents and therefore the High Court have no power under Section 15 of the Charter Act "to "make and issue general rules for regulating the practice and pro-"ceedings of such Courts. . . ." and it is the fact that the High Court has not issued any rules for regulating their practice and proceedings. It is further contended that the jurisdiction of the Agency Court is superior to that of the District Court of Vizagapatam and the order is therefore bad.

The jurisdiction of the Agency Court of Vizagapatam and that of the District Court is equal in all respects except that by rule 17 of the rules made by the Governor in Council under Section 4 of the Act under which the Agency Courts are constituted, the Agent is given power to hear second appeals—a power which is said to be in excess of the jurisdiction of the District Court.

The counter-petitioners, however, contend that the order which I am asked now to reverse was not *ultra vires* and should not be set aside. They contend that it is only by reason of the rules that there is any other appellate jurisdiction than that of the High Court and that the power to hear second appeals is given to the Agency Courts and they submit that these rules are *ultra vires.* This must depend upon the power given by the Act under which they purport to be framed, *viz.*, Section 4 of the Act XXIV of 1839.

By Section 3 of that Act the Collector is appointed as Agent to the Governor of Fort St. George to administer civil and criminal justice and to collect and superintend the revenues, and Section 4 gives the Governor in Council power "to prescribe such rules as he may deem proper for the guidance of such Agents and of all the officers subordinate to their control and authority and to *determine to what extent the decision of the Agents in civil suits shall be final and in what suits an appeal shall lie to the Sadr Adalat* and to define the authority to be exercised by the Agents in criminal trials," &c.

The power given to the Governor in Council to make rules under this section is confined to (*a*) prescribing such rules as he may deem proper for the guidance of such Agents, (*b*) to determine to what extent the decision of the Agents in civil suits shall be final,

and in what suits an appeal shall lie to the Sadr Adalat and (c) to define the authority to be exercised by the Agents in criminal trials, &c. Now, unless the power to prescribe rules for the guidance of Agents contains the necessary authority to create any Court of appeal other than the Sadr Adalat, it is perfectly clear that there is no such power in the words that follow, for they only authorise the Governor in Council to determine to what extent the decision of the Agents in civil suits shall be final and when an appeal is allowed the appeal is directly stated to be to the Sadr Adalat and no power is given to the Governor in Council to create any Court of appeal other than the Sadr Adalat.

I am of opinion that there was no power given by the Act to the Governor in Council to create by rules any Court of appeal from the decision of the Agent in civil suits and consequently the rule relied on by the petitioner, rule 22, is *ultra vires* and of no effect and that the Agency Courts are subject only to the appellate jurisdiction of the High Court. Moreover, I do not think that the power given to prescribe rules for the guidance of Agents precludes the High Court from making and issuing general rules for regulating the practice and proceedings of such Courts under Section 15 of the Charter Act.

The only question that remains is whether the jurisdiction of the Agency Court is superior to that of the District Court. I am of opinion that it is not. The extent pecuniarily of the two Courts is equal and the High Court has equal power to review the decrees of both (see rule 20) and the fact that by rule (17) power is given to the Agent to admit a special appeal from a final appellate decision of his Divisional Assistant (even if that part of the rule which makes an appellate decision of a Divisional Assistant final is not *ultra vires* as I think it is, for the Act gives no power to the Governor in Council to make any decision of an Assistant of the Agent final) is not sufficient of itself to make the jurisdiction of the Agency Court superior to that of the District Court in the circumstances.

For these reasons I am of opinion that the order of the 30th September 1898, transferring the case from the file of the Agent to that of the District Judge of Vizagapatam, was not *ultra vires* and I dismiss this civil miscellaneous petition with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Boddam and Mr. Justice Moore.

Varadaraja Appa Rau ... ... Petitioner (*Plaintiff*)*

v.

Suryaprakasa Rau and another ... Respondents (*Defendants*).

Varadaraja Appa Rau *v.* Suryaprakasa Rau.

Indian Contract Act, S. 25, Cl. 3—Promise in writing to pay barred debt—Knowledge of bar—Intention to create a fresh obligation—Proposal—Acceptance—Identity of debt.

In order to satisfy the requirements of S. 25, Cl. 3, Contract Act, a document need not show any intention of creating a *fresh* obligation in consideration of the barred debt; nor need the debt be known to be barred at the date of the document.

The proposal and the acceptance need not both be in writing. A proposal in writing if accepted before the date of the suit will satisfy the terms of the statute.

The amount of the debt need not be mentioned. It is enough if the debt is mentioned in such a way as to be capable of identification.

Where a document which was relied on in answer to a plea of limitation, as containing a promise to pay the barred debt and giving a fresh starting point of limitation ran as follows: "In your letter, dated the 24th March 1898, you said that the Kattubadi from Fasli 1300 to 1307 was in arrears and that the same should be sent through the peon. There are no collections now. I shall send by the end of Vaisakha month. Please to consider":—

Held that the document satisfied the terms of S. 25, Cl. 3 of the Contract Act, and that the plaintiff had 3 years from the date of the document within which to sue.

Petition, under Section 25 of Act IX of 1887, praying the High Court to revise the decree of the Subordinate Judge's Court of Kistna in Small Case Suit No. 1121 of 1898.

The plaintiff brought a suit to recover Rs. 90-14-1 for rent due in respect of Faslis 1300 to 1307. The defendant set up the statute of limitation against a portion of the plaintiff's claim. The plaintiff relied upon Exhibit A as containing a promise to pay the debt and contended that it gave him a fresh start. The Subordinate Judge held that the document could not help the plaintiff as it did not specify the exact amount due. Hence this revision petition.

P. S. Sivaswami Aiyar for petitioner: The Judge has held that the claim for Kattubadi in respect of the first four faslis is barred. Exhibit A clearly contains a promise to pay the barred debt and this suit is brought within 3 years of the date of Exhibit A. The Subor-

* C. R. P. 12 of 1899. 30th August 1899.

dinate Judge seems to think that in order to be a good promise to pay, the document should mention the exact amount due. In this he is clearly wrong and the only issue raised in the case having reference to limitation, the judge ought to have awarded the whole claim.

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P. R. Sundara Aiyar for counter-petitioner: The document is not an agreement to pay the barred debt but only an acknowlegment of it. The document does not satisfy the requirements of S. 25, I. C. A. Under that section there must be an intent to create a new liability in consideration of the barred debt: and then the cause of action for the suit is not the barred debt but the new contract. Here the suit is not brought upon the document but upon the old debt and the document is relied on as saving limitation. This is clearly on the ground that it is an acknowledgment but as such it is of no use because it was executed after the debt was barred. In order to satisfy S. 25, the old debt must be extinguished and a new obligation should come into existence. [*Boddam J.* What is your authority ?] That is the general principle of the Contract Act. According to the Act every contract should have consideration. And S. 25, Cl 3, declares that the barred debt is sufficient consideration for a promise. A subsequent suit for the recovery of the money should be based upon this promise, not upon the barred debt. The promise should refer to the barred debt and recite it as consideration. [*Moore* J. There is a reference to the barred debt.] No, there is not. The document proceeds entirely upon the idea that the debt is still in existence. Moreover there is this difficulty. The document says that the money will be paid in Vaikasi. Can the plaintiff bring a suit before that date. [*Boddam* J. Should it be known to be barred ? Should the party know that he is creating a fresh obligation in consideration of the barred debt ?] He should know it. I call it a fresh obligation in the sense that no suit can be based upon the antecedent debt. Moreover in order there there may be a promise, there must be a proposal, there must be an acceptance. Where is the proposal here ? and where the acceptance ? The whole must be in writing under S. 25, Cl. 3 [*Boddam J.* There is here a proposal in writing which when accepted, becomes a promise]. The acceptance must also be in writing. [*Moore J.* The proposal in writing when accepted is a promise in writing]. [*Boddam J.* The section simply says that there should be a promise in writing to pay the barred debt.] Before it becomes a promise, the proposal has to be accepted. A proposal in writing is not a promise in writing. The document is a mere acknowledgment and is of no use to the plaintiff's claim.

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P. S. Sivaswami Aiyar (in reply).—The fact that the debt is barred need not be present to the mind of the promisor. Everybody must be presumed to know the law. The view contended for would make the section practically useless. The words of the section show that the promise is to pay *the debt* and not to pay money in consideration of the debt. The suit was rightly brought upon the debt. As for the other question, it is the proposal that becomes a promise. The proposal in writing when accepted becomes a promise in writing. The acceptance is the condition precedent to the proposal becoming a promise. The section does not require an express acceptance. Clearly it must be presumed in such cases.

The Court delivered the following

JUDGMENT:—The question in this case is whether Exhibit A is within Section 25 (3) of the Contract Act and constitutes "a promise...to pay...a debt of which the creditor might have enforced payment but for the law of limitations". The Sub-Judge held that it did not, apparently because it did not name the amount: for he ends this part of his Judgment by saying "it does not certainly show that there was an agreement that the sum sued for is payable by the defendant to the plaintiff."

The plaintiff sued for the unpaid Kattubadi due for Faslis 1300 to 1307 inclusive and put in Exhibit A as showing a fresh starting point from which the statute began to run. Exhibit A was written by the defendant to the plaintiff and is as follows :—

"In your letters, dated 24th March 1898 (sic) you said that the Kattubadi from Fasli 1300 to Fasli 1307 was in arrears and that the same should be sent through your peon. There are no collections now. I shall send by the end of *Vaisakha* month (April to May). Please to consider"—and signed it.

It was argued before us that this was not sufficient to make a fresh contract but was really of not more effect than an acknowledgment under Section 19 of the Limitation Act and did not give any cause of action for any part of the debt which was already barred.

The contention on behalf of the defendant was that this document did not satisfy the statute, because to come within the section the document must show a clear intention to create a fresh obliga-

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tion; that the barred debt must referred to and not only be referred to, but in such a way as to show that it formed the consideration for the promise to pay; and further that it was intended by the statute that this should be done by a formal proposal duly accepted and subsequently put into writing: because by Section 2 the word "promise" used in this Section [25 (3)] is defined as being "a proposal when accepted," and it does not become a "promise" until it has been accepted; that here the document was a mere "proposal" which had not been accepted when it was written and was not a promise within the section as it was not an accepted proposal put into writing after acceptance.

We are, however, of opinion that the document (Exhibit A) is sufficient to satisfy the statute.

For this purpose we think the document is sufficient when it is in writing and signed by the person to be charged; when it refers to the debt—not necessarily to the fact that the debt is no longer recoverable owing to the law of limitations—but in such a way as to identify the debt; when it contains a promise to pay wholly or in part the debt referred to therein—that is, when it expresses an intention to pay which can be construed to be a "promise" within the meaning of the section. We do not think that to create a "promise" within the meaning of the section it is necessary that there should be an accepted proposal reduced into writing. The definition clause says a proposal when accepted becomes a promise. It does not say a proposal when accepted and reduced to writing becomes a promise and in our judgment all that is requisite is that there should be a written proposal accepted before action; for, a written proposal becomes a promise when accepted—as was the case here: the action not having been brought until the time named in the document for payment had elapsed.

The section does not require that the document should contain a promise to pay a sum of money in consideration of a debt which is barred nor that it should show that the promisor knew that it was barred—for the words used in the section show that it is the debt and not a sum of money in consideration of the barred debt that the promisor should refer to and there is nothing whatever in the section to indicate that the promisor should do more than promise to pay a debt of which the creditor might have enforced

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payment but for the law of limitation of suits. The words are not "promise to pay a sum of money in consideration of a debt" nor does the section refer to the knowledge of the promisor. Every man is supposed to know the law and in this case the promisor has mentioned the years for which the rent was in arrear and must be supposed to have known the law of limitations so that even if that were a necessity in this case the promisor must be taken to have known that the debt referred to was barred to some extent at all events.

We think that Exhibit A contains all the ingredients required by Section 25 (3) of the Contract Act, and that the decree of the Sub-Judge is wrong. We allow the petition and vary the decree of the Sub-Judge and enter judgment for the plaintiff for the full amount of his claim with costs throughout.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Boddam and Mr. Justice Michell.

Krishnan ... ... Appellant* (*1st defendant*).

v.

Kunhi Moidin Kutti and another ... Respondents (Decree-holder and Assignee of the decree.)

Krishnan v. Kunhi Moidin Kutti.

Construction of decree—Reasonable construction—Civil Procedure Code S. 211.

Where a decree for redemption of a kanom directed the recovery of property on payment of the kanom amount minus 'the purapad sued for and the purapad accruing due thereafter':—

Held that though the terms of the decree were indefinite, having regard to the provisions of S. 211, C. P. C., the decree should be taken to have allowed the deduction of nothing more than the rent due until the delivery of the property or the expiration of 3 years from the date of the decree whichever event first occurred.

Appeal from the order of the Subordinate Judge's Court of Calicut in A. S. No. 536 of 1898 reversing the order of the Court of the District Munsif of Kutnad in M. P. No. 172 of 1898 in the matter of C. S. No. 637 of 1887.

T. M. Appu Nedungadi for appellant.

K. V. Karunakara Menon for respondents.

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* A. A. A. O. 17 of 1899. 11th September 1899.

Krishnan v. Kunhi Moidin Kutti.

The Court delivered the following

JUDGMENT:—The question in this appeal depends upon the construction of the decree of the 11th September 1888. That decree says that the plaintiff is to pay certain sums on surrender of the land sued for after deducting the purapad sued for and the purapad that has accrued thereafter. The plaintiff contends that this decree enables him to deduct all rent that may accrue thereafter at any time but the defendant contends that the words are not intended to give the plaintiff more, and do not give him more, than is permissible under S. 211 of the Code of Civil Procedure which limits the right of the Court to provide for more in the decree than the rent payable until delivery of the suit property or until the expiration of 3 years from the date of the decree, whichever event first occurs.

The District Munsif took the latter view, but was overruled by the Subordinate Judge who refers to I. L. R., 9 A., 296 as supporting his decision. We are unable to agree with him nor does the case cited assist. It merely decides that the 3 years dates from the final decree.

We think the decree of the Subordinate Judge is wrong and must be set aside and the decree of the District Munsif restored with costs in this and the lower appellate court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice O'Farrell and Mr. Justice Michell.

Ramasami Aiyar ... ... Petitioner* (*Accused*)

v.

Ambalavana Pillai ... ... Complainant.

Ramasami Aiyar v. Ambalavana Pillai.

District Boards Act IV of 1884 (Madras) S. 180, Cl. 5—Building pyal—License from Municipal Council—Bench of Magistrates—some not present throughout the trial—Irregularity.

Under S. 180 Cl. 5 of Madras Act IV of 1884 it is an offence to build a pyal without a license from the Municipal Council therefor before 6 weeks have elapsed from the date of the application for the license.

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* Cr. Rev. Case 159 of 1899. 18th August 1899.

Ramasami Aiyar v. Ambalavana Pillai.

Where only three out of six Magistrates constituting a Bench were present throughout the trial, while the other three heard only the defence and came to the same conclusion as the former three .—

Held that as the case was rightly decided, upon the merits the irregularity of procedure was not such as to vitiate the proceedings and that the appeal should be dismissed.

Petition under Ss. 435 and 439 of the Criminal Procedure Code praying the High Court to revise the Judgment of the joint Magistrate of Tanjore in Criminal Appeal No. 145 of 1898 affirming the conviction and reducing the sentence passed in C. C. No. 412 of 1898 on the file of the Bench of Magistrates, Mayavaram.

T. V. Seshagiri Aiyar and *T. S. Krishnaiyar* for petitioner.

V. Krishnaswami Aiyar for complainant.

The Court made the following

ORDER :—It is admitted by the petitioner's vakil that the petitioner proceeded to construct the pyal without having obtained a license from the Municipal Council and before the expiration of 6 weeks from the date of sending in his application under S. 180 of Madras Act IV of 1884. It is therefore clear that he committed an offence falling within sub-section (5) of that section. It is urged, however, that the conviction is bad because all the members who constituted this Bench of Magistrates which tried the case were not present during the whole of the trial, three only of them having been present during the whole trial and the other two having only been present during, and heard the defence portion of the trial. It appears that five of these six Magistrates have written judgments and the remaining Magistrate delivered his judgment orally. Detailed judgments were written by the three who heard the whole of the evidence. The judgments of the other two who wrote judgments merely expressed concurrence with the judgment of one of them who tried the whole case. All six Magistrates concurred in finding the petitioner guilty of an offence under S. 180, sub-section (5) of the said Act. The only irregularity therefore appears that the three out of the six Magistrates who had heard only the defence part of the trial expressed their judgments in the case as well as the three who had tried the case throughout. As the former three came to the same conclusion as the latter three Magistrates, and the con-

clusion they came to was, in our judgment, a correct one and is moreover on a mere question of law, the facts being undisputed, we consider the circumstance of three out of Six Magistrates who heard only the latter portion of the case having given their Judgments as well as the three who heard the whole case, is not an irregularity of such a nature or degree as to vitiate the proceedings or to require our interference in the particular circumstances of the case.

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The petition is, therefore, dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—Mr. Justice O'. Farrell and Mr. Justice Michell.

Subrahmanya Aiyar ... ... Petitioner * (accused),

v.

Asirvadam Pillai ... ... Complainant.

District Boards Act IV of 1884 (Madras) Ss. 180, 263—License for building with thatched roof—Illegal refusal of sanction—Building with tiled roof.

Subrahmanya Aiyar v. Asirvadam Pillai.

Where an application to the Municipal council for a license to erect a building with *thatched* roof was refused under a misapprehension that the land on which it was proposed to build was public land and six weeks after the date of the application the applicant erected a building with *tiled* roof:—

Held that sanction was illegally refused and that a roof having been mentioned in the application, the mere change in the material of the roof did not make the building substantially different from that applied for, so as to constitute an offence under S. 180 of Act IV of 1884.

Petition under S. 435 and 439 of the Criminal Procedure Code praying the High Court to revise the judgment of the joint Magistrate of Tanjore in Criminal, Appeal No. 10 of 1899 affirming the conviction and modifying the sentence of the Bench Magistrates of Mayavaram in C. S. No. 625 of 1898.

T. V. Seshagiri Aiyar and *T. S. Krishnaiyer* for petitioners.

V. Krishnaswami Aiyar for complainant.

The Court made the folllowing

ORDER:—The petitioner has been convicted under S. 263 (Act IV of 1884). He had applied under S. 180 for license to erect a building, with a roof which he proposed to construct of

* Cr. Rev. Case 158 of 1899. 18th August 1899.

Subrahmanya Aiyar v. Asirvadam Pillai.

thatch. He was prohibited by the Municipal Council from building the only reason assigned being that the land was public land. This turns out to be erroneous and the prohibition was therefore illegal. At the end of 6 weeks he erected the building (as he was entitled under S. 180 (5) to do) but he constructed the roof of tiles and not of thatch. For that he has been convicted under S. 263 of the said Act. It is admitted that no bye-laws have been framed by the Municipal Council under S. 180, and the materials of which the roof is to be constructed are not required by the Act itself to be stated in the application license. It is contended for the complainant that the (accused) petitioner, applied for a license for one thing and actually constructed another. This is mere quibble. A roof is a roof whether it is built of thatch or of tiles. If the materials of which the roof is to be constructed are important from a Municipal point of view the Council should frame bye-laws as they are entitled to do under the section. We reverse the conviction and sentence, and direct that the fine be refunded.

IN THE HIGH COURT OF JUICDATURE AT MADRAS.

Present :—The Mr. Justice Boddam, and Mr. Justice Moore.

Srirangammal ... ... Appellant (*Plaintiff**).

v.

Sandammal and others ... ... Respondents (*Defendants 1 to 8 and 11 to 14*).

Evidence Act, S. 44—Decree—Fraud—Administration of estate—Share not allotted—Purchase of distributive share in specified properties—Suit for partition—Administration Action.

Srirangammal v. Sandammal.

John Arivanandam, a native Christian, died intestate in April 1884 leaving a widow Sarah, a son and a daughter. Letters of administration were issued to Sarah and the son in January 1885. But Sarah disappeared from that time and was not heard of since. In January 1885 the plaintiff brought Civil Suit 2 of 1885 on the Original Side of the High Court against Sarah upon a promissory note alleged to have been executed by her and obtained an *ex parte* decree in the same month. In execution of the decree the plaintiff purchased the one-third share of Sarah in the properties of John Arivanandam. The present suit was brought by the plaintiff against the daughter and the daughter-in-law of John Arivanandam and their alienees, for partition and recovery of Sarah's one-third share in the properties of John Arivanandam. Before the date of the present suit Arivanandam's son had died and the daughter-in-law had obtained letters of administration to the estate of

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* A. Nos. 187 and 188 of 1898. 26th September 1899.

Arivanandam. Neither the son nor the daughter-in-law had completed the administration of the estate of Arivanandam. In answer to the present suit the defendants contended *inter alia* that the decree had been obtained fraudulently without notice to Sarah, that the promissory had not been executed by Sarah and had no consideration, that Sarah was not alive at the date of the execution sale, that the decree and execution proceedings were therefore null and void and that the estate not having been administered the suit for partition was unsustainable.

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Held that a party to a decree or his representatives can, as defendants in a subsequent suit impeach the decree on the ground of fraud.

Held also that before the distribution of an estate by the administrator and the allotment of shares to the next-of-kin, a next-of-kin is not entitled to maintain a suit for the recovery of any specific share or for partition and can only bring a suit for administration making all persons interested in the estate parties to the suit.

Appeals against the decree of the District Court of Trichinopoly in Original Suit, No. 10 of 1895.

John Adam and *Joseph Satya Nadar* for appellant.

V. Bhashyam Aiyangar for 11th respondent.

P. S. Sivaswami Aiyar for 7th respondent.

P. R. Sundara Aiyar for 5th respondent.

T. Rangachariyar for 8th respondent.

The Court delivered the following

JUDGMENT :—The plaintiff's action is for partition by metes and bounds of certain properties set out in the schedule to her plaint and that one-third thereof may be given to her, she having purchased in Court auction under a decree obtained by her in O. S. No. 2 of 1885 the one-third share therein of one Sarah Ammal, the widow of one John Arivanandam Pillai, deceased.

The defendants denied her right to the relief asked for and alleged that the decree obtained by the plaintiff in O. S. No. 2 of 1885 was obtained by fraud.

The story is an extraordinary one. John Arivanandam Pillai, a Native Christian pleader, died intestate on the 4th April 1884 at Trichinopoly where he had resided, leaving him surviving his widow Sarah Ammal, a son Somasundaram Pillai (the husband of the first defendant) and a daughter Ratnavati Ammal, the 4th defendant.

Being a Native Christian, the Indian Succession Act (Act X of 1865) applied to the estate of the deceased. He was a rich man and left considerable property. His widow, who was an intem-

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perate woman and very much under the influence of the plaintiff, applied for letters of administration to his estate. His son Somasundaram Pillai applied to be joined with her under section 202, in the grant and on the 10th September 1884 an order was made by the District Judge of Trichinopoly granting letters of administration to the petitioner and her son jointly. As stamps were not furnished this order was cancelled, but on the 29th October 1884 a fresh petition was put in on behalf of the widow asking that letters should be granted to her alone excluding her son; and on the 17th December the son put in a petition asking for grant to him alone. On the 19th January 1885, however, letters were issued jointly. The son acted solely, however, for from this time the whereabouts of the widow became lost in mystery and no one who had known her before is proved to have since seen her—unless the plaintiff has, as she alleges—as will be shown later on.

On the 6th January 1885 the plaintiff put in a plaint in the High Court at Madras claiming from the widow of the deceased Rs. 15,600 (C. S. No. 2 of 1885). By her plaint she stated that, on the 5th September 1884, at Madras, the defendant by her promissory note promised to pay on demand to the plaintiff or her order Rs. 15,000 with interest at 12 per cent. and that she had not paid the same or any part thereof in spite of frequent demands. The return day fixed in the summons was the 22nd January; and on that date the plaintiff obtained an *ex-parte* decree against the widow for Rs. 15,600 and costs. On the summons is written—as an acknowledgment of service—" Mrs. S. Areevanandam." The promissory note put in by the plaintiff is signed " Mrs. S. John Arivanandam." Both are written in English. It appears from a perusal of the Judge's notes at the hearing that the plaintiff at that time merely stated that she saw the defendant sign the note and that she paid her the Rs. 15,000. The plaintiff in execution of this decree attached various portions of the property of the late John Arivanandam Pillai and brought them to sale, becoming herself the purchaser of the one-third share of Sarah Ammal in each lot so sold. She says she purchased for Rs. 100 property worth many thousand rupees. She now, in this action, asks for partition of these properties by metes and bounds and that the third share of Sarah Ammal should be delivered to her,

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In February 1885 the son Somasundaram Pillai applied to the Court that letters of administration to the estate of his father should be handed over to him alone as he was unable to see or communicate with his mother; and on the 27th February 1885, when the application came on, the Vakil who had appeared for the widow said he did not know where she was, but would enquire and the case was adjourned to the 6th March for that purpose. On the 8th March the Vakil said he had been unable to ascertain her whereabouts and an order was made directing letters of administration to be handed over to the son (see Exhibits XXIII *a* and *b*). In August and September 1885 the daughter presented petitions against the administrators, but the widow could not be found (see Exhibits XXIV and XXVII and XXVIII). In October 1885 the surety for the widow desired to withdraw, but notice could not be served as the widow could not be found (see Exhibits XXIX, XXXI*a* and XXXI*b*).

In January 1886 a warrant was issued for the arrest of the widow at the plaintiff's instance but she could not be found even by the plaintiff (see Exhibit XXXV*a*). In January 1887, again she could not be found (see Exhibits XXXV and XXXVI). Exhibit XXXVI is signed by the Village Munsif of Pandamangalam, who says that when he and the peon enquired at the village of Pandamangalam for Sarah Ammal *alias* Mrs. John Arivanandam "the people say there is no person of that name in this village. I know this fact." This is dated the 28th January 1887, and yet according to Exhibit XXXVII a notice is endorsed "I received copy of this notice, on the 27th January 1887. Signed Mrs. S. Arivanandam" (the name being the same as in the endorsement as the original summons in O. S. No. 2 of 1885), the notice as far as can be gathered from it having been served at Pandamangalam, the very place where on the following day the Munsif says there is no person of that name in the village. It is observable, too, that one of the witnesses to the signature in Exhibit XXXVII is a native of Srirangam where the plaintiff lives. However, the District Judge held that "this service appears not to have been made on the person named in the summons" and declares the service insufficient. Exhibits XXXVIII*a* and XXXVIII*b* show that, in like manner, in April 1887 the widow could not be served; and in

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August 1887 an order is passed by the District Judge of Trichinopoly: "As it appears impossible to procure the attendance of the judgment-debtor, the Court must dispense with examining her." In April 1887, however, a petition had been presented to the District Court at Trichinopoly purporting to be presented by the widow which is signed "Mrs. S. Arivanandam" (the same signature again) consenting to the sale of her properties, but it is not proved to have been signed by the widow nor that the gentlemen who purported to witness the signature knew her (see Exhibit M). In October 1887 the son Somasundaram Pillai put in a petition to set aside the attachments obtained by the plaintiff in execution of C. S. No. 2 of 1885 alleging that the widow's whereabouts were unknown but the petition was dismissed—Exhibit D. He also in the same month filed a plaint in the High Court, Madras, to set aside the decree in C. S. No. 2 of 1885 and to declare the promissory note on which it was obtained a forgery. In his plaint he alleges that since administration no tidings have reached the family as to his mother's whereabouts and that all attempts to trace her have proved of no avail. In January 1888, however, Somasundaram Pillai died and when the case came on for issues, as the representatives had not come in, it was ordered that the suit should abate. On the 23rd March 1888 the widow of Somasundaram Pillai (the 1st defendant in this suit) got an order that an Amin of the District Court of Trichinopoly should take charge of the property of Somasundaram Pillai. In July 1888 an order was made on a petition wherein the petitioner is called Mrs. Arivanandam Sarah Ammal—Exhibit L. The petition is not exhibited and who put it in cannot be ascertained. The order precludes the Amin from interfering with the estate of Arivanandam whilst petitioner's letters of administration are still in force.

In August 1888 an order was made by the District Judge of Trichinopoly revoking the grant of letters of administration to the estate of the late John Arivanandam Pillai because of the death of Somasundaram Pillai and the unfitness of the widow, if she was alive, and appointing the Amin of the Court the administrator of the estate of the late John Arivanandam Pillai. In his order (Exhibit XLIV) the Judge speaking of the widow Sarah Ammal says: "It is "evident that if she is alive, which is doubtful, she is kept out of the

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"way by persons who wish to make use of her name. She is "further disqualified for being administrator by having parted "with nearly all her interest in the estate of the deceased (⅓) to "one Srirangammal of Srirangam who is evidently the real counter-"petitioner. This person has seized control of the estate under "cover of the grant of letters of administration to Sarah Ammal," &c.

In May 1890 an application was made by the present 1st defendant, the widow of Somasundaram, to appoint her *interim* administratrix of the estate of the late John Arivanandam Pillai and thereupon the District Judge made a special order adjourning the case in order to communicate, if possible, with Sarah Ammal. "If Sarah Ammal is not produced before the 1st June petitioner may apply to me to be appointed *interim* administratrix *pendente lite* and I will grant it." She was not produced, and on the 12th March 1891 the the District Judge in an admirable judgment revoking the grant of letters of administration to Sarah Ammal gives his reasons for concluding that a gross fraud was being attempted to be played on the Court, and we are fully satisfied that he is right in his conclusions. On the 30th October 1894 an order was passed granting to the 1st defendant letters of administration to the estate of the late John Arivanandam Pillai, and this was confirmed on appeal to the High Court by their decree, dated 4th December 1896.

This was the state of affairs prior to the commencement of this action, from which it appears that, since January 1885, there has been continuous litigation between the plaintiff and the representatives of the deceased John Arivanandam Pillai, only a portion of which has been referred to above, and in almost the whole of which efforts have been made unsuccessfully to obtain the appearance of Sarah Ammal. It is also clear that, from time to time, though Sarah Ammal has never been seen by any one interested in the proceedings and who knew her, she has been represented occasionally but invariably by a vakil who does not pretend to know anything of her or of her whereabouts. If she is alive and capable, she has successfully evaded all the efforts of the Courts to get her to appear, in a way which, to say the least, is surprising; and if she is incapable or dead, she is being personified by some one for purposes of their own; and it is difficult to see how her relations could benefit by her appearances on the occasions on

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which she has purported to take any interest in what has been going on. She purports to have signed the promissory note upon which C. S. No. 2 of 1885 is based and to have endorsed the summons. From that time, January 1885, if in fact she did endorse the summons, till the 27th January 1887, she cannot be served; then, on that date, a notice is endorsed "received copy of this notice—Mrs. S. Arivanandam" at the place and on the day before the villagers and Munsif of Pandamangulam say there is no such person there. This is a notice that a day has been fixed for enquiring as to her interest in properties attached by the plaintiff and the plaintiff alone could be benefited by the notice being shown to have been served. In April 1887 there is a petition purporting to be put in by the widow consenting to the sale by the plaintiff of her properties —the plaintiff alone could benefit by this. In November 1887, the plaintiff having been refused leave to bid at the Court sale of the widow's property, a vakil appears for the widow on the appeal of the plaintiff to the High Court and consents; and lastly, in July 1888, a petition is put in, in her name objecting to the Amin of the Court being appointed to take possession of the estate which the plaintiff desires to dispose of. On every occasion, therefore, in which she has purported to appear, the only person who could have benefited by her appearance has been the plaintiff. If, therefore, she is being personated, the assumption would naturally be that it is by the plaintiff or at the plaintiff's instance.

We now come to this action, and the onus being on the defendants they commence their evidence by calling the plaintiff and, having regard to what she proved in C. S. No. 2 of 1885, her evidence is remarkable. Her story now is not that she lent Sarah Ammal Rs. 15,000 on a promissory note, but quite a different story. In effect she says Sarah Ammal and her son and daughter before letters were granted wanted her to buy a village for Rs. 15,000; she spoke to Somasundaram and the 4th defendant about it and they all arranged the sale at Trichinopoly; that she and Sarah Ammal and Somasundaram (but not the 4th defendant) came to Madras to take the opinion of Mr. O'Sullivan and get the deeds prepared; and that she brought the money with her and without any receipt or any deed she paid Rs. 15,000 to Sarah Ammal who gave it to Somasundaram who went off with it and they all then

declined to carry out the agreement. They said they would do so after getting letters, however, but after they got letters they refused to do so and on their refusal the plaintiff filed her suit. She also says the suit was filed before the letters were granted. Money was paid at the time the promissory note was given. Money was paid in Madras and promissory note was given in Madras and at the same time she says the family was not in debt. Sarah Ammal had money enough. They were selling the land to effect division of properties.

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Now, if that story is true, it is difficult to understand why the action was brought against Sarah Ammal alone on the promissory note, or why Sarah gave the promissory note. Why should the plaintiff have brought the money to Madras? Why should Sarah have given the promissory note in Madras since they were all at Trichinopoly when they finally refused to sell? Why should the plaintiff have paid the money before the deeds were prepared and executed and why has nothing been said about this supposed agreement to sell before? Why did she pay the money in the absence of the 4th defendant who remained in Trichinopoly? Indeed, the story is, on the face of it, so utterly improbable that, in the absence of strong corroboration, no one could believe it. It is not corroborated, but its improbabilities are added to by the rest of her evidence. The explanation given of where the money came from is quite incredible. She says that she became a widow in 1862. She was in litigation with her husband's family and her father gave her Rs. 40,000 in cash for her maintenance—a most improbable story, for no rich native would give cash to a young widow when he could have settled other property on her; and, if he had done so, how much of it would have been left in the hands of a young widow 22 years afterwards? She further says that she saw Sarah Ammal a week ago in the house of her pleader and spoke to her and spoke to her counsel about it afterwards. Her counsel does not go into the box and she calls no one to corroborate her in any way. On the other hand, there is abundant evidence to show that her story is untrue, without going into it in greater detail.

We agree with the District Judge and do not believe the plaintiff's story. We go further, however, and say we do not believe that the plaintiff had Rs. 15,000 or that she paid Rs. 15,000

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to Sarah Ammal in Madras. We do not believe that Sarah Ammal executed the promissory note in Madras and we are not satisfied that she ever in fact signed the promissory note or that, if she did, she knew what she was doing. If she did, it is by no means certain that she ever endorsed the plaint or was aware that any action had been brought against her; and we have no hesitation in finding, as a fact, that the decree in C. S. No. 2 of 1885 was obtained by fraud and is null and void against the defendants.

We have no doubt that the defendants are entitled to set up this defence under Section 44 of the Evidence Act. If authority were wanted for this decision the two cases, *Rajib Panda* v. *Chowdhry*, 3 Cal. W. N., 660, and *Sreemuthy Nistariney* v. *Rai Nundo, Lall Bose*, Ibid., 670 are in point; but apart from authority it is clear that by the words of the Act as by the English law a person not an actual party to the fraud may set up fraud as an answer to a decree either of an English or any foreign Court—see *Cole* v. *Langford*, [1898] 2 Q. B. 36.

All these questions are, however matters which are entirely immaterial in this case, for in no circumstances can the plaintiff succeed in her present action.

The plaintiff's action is for partition by metes and bounds of certain specified portions of the estate of the late John Arivanandam Pillai set forth in the plaint schedule, she having purchased the one-third share of Sarah Ammal in each of those portions of the property. All the property, however, of the deceased John Arivanandam Pillai became vested in his administrator and under the Succession Act remained in him until he distributed the estate, and the widow had no saleable interest in any part of the estate until, in the course of the administration thereof, her share was determined and became allotted to her. Until that happened (and it has not yet been done) the only process by which the plaintiff could legally obtain the widow's interest in the estate is by a suit for the administration of the estate of John Arivanandam Pillai, and to such suit the widow, if alive, must be made a party. If she is not alive, letters of administration to her estate must first be taken out and the administrator must be made a party. The plaintiff, in her evidence, says that she saw Sarah Ammal a week before she was examined at the house of her pleader. If so, she was alive at the commencement of this suit and even if it were possible to treat this suit as an

administration suit (though it clearly is not possible so to treat it) it would necessarily have to be dismissed for want of parties as she is not joined as a party.

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The suit is wholly misconceived and should for this reason be dismissed. As, however, the litigation has been so prolonged and has been and is being conducted in a way which leaves no doubt in our minds that a conspiracy exists and is being carried out with a view to deceive the Courts, we have thought it right to consider the case of fraud set up by the defendants and to express our view upon the decree in C. S. No. 2 of 1885. That the same fraudulent conduct is continuing is obvious from the attempt to compromise these appeals and we have little doubt that the plaintiff has succeeded in inducing the 1st and 4th defendants to join with her in her attempt to get a decree in this Court by fraudulent means.

It is clear to us that, if Sarah Ammal is alive, she is, and has been for many years past, under the protection and in the hands of the plaintiff, who is and has been making use of her as her tool for the purposes of her proceedings. If Sarah Ammal is not alive, we are satisfied that, from the time of her death, she has been personated by or at the instance of the plaintiff with the same view. The evidence shows that in 1884 Sarah Ammal was given to intemperance and was under the influence of the plaintiff who was even then supplying her with drink, and we believe that from the time of her disappearance—so opportune so far as the plaintiff's designs were concerned—until her death, if she is dead, or, if not, until the present time, she is and has been a mere tool in the hands of the plaintiff, ignorantly signing what she was told to sign and unconscious of what was going on.

For these reasons we think the decree of the District Judge was right that the decree in C. S. No. 2 of 1885 was obtained by fraud and we dismiss this appeal with costs of 7th, 8th and 9th respondents.

The 8th respondent's claim was admitted in the Court below and he has been unnecessarily made a respondent in this appeal. The plaintiff must pay his costs of the appeal.

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Subrahmanyam v. Ramasawmy.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Subrahmanya Aiyar and Mr. Justice O'Farrell.

Subrahmanyam ... ... Appellant* (*Plaintiff.*)

v.

Ramasawmy and others ... ... Respondents (*Defendants.*)

Practice—call for additional stamp—bonâ fide mistake as to time granted—Delay.

Where a Vakil *bona fide* believed that the time granted for the payment of additional stamp duty was fifteen days whereas it was only a fortnight and paid the money on the 30th April instead of on the 29th :—

Held that the Court had power to extend the time originally allowed and that in the circumstances of the case, the time should have been extended and the delay excused. *Chunni Lal* v. *Ajudhia Prasad,* I. L. R., 19 A., 240 referred to.

Appeal from the decree of the District Court of Godavari in O. S., No. 3 of 1897.

P. R. Sundara Aiyer for appellant.

P. S. Sivaswami Aiyer for respondent.

The Court delivered the following

JUDGMENT :—There appears to have been a *bona fide* mistake on the part of the pleader as to the time allowed for payment of deficient stamp duty, which was paid and accepted by the District Court on the 30th April instead of the 29th. We think the District Judge ought to have granted an extension of time for one day, and we have no doubt that he would have done so had he not been under the impression that he had no discretion in the matter. This is, however, an error. See *Chunni Lal* v. *Ajudhia Prasad,* I. L. R., 19 A., 240, and the cases there cited. We reverse the decree of the District Judge and direct that the suit be readmitted to the file and disposed of on the merits.

Costs will abide and follow the result.

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* A. No. 229 of 1898. 21st September 1899.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Subrahmanyam Pillai v. Narayana Aiyangar.

Present:—Mr. Justice Moore and Mr. Justice Michell.

Subrahmanyam Pillai ... ... Appellant * (*Petitioner*),

v.

Narayana Aiyangar and another ... Respondents (*Counter-petitioner*).

Transfer of Property Act, S. 89—Order absolute for sale.

An order absolute for sale under s. 89 of the Transfer of Property Act is not a mere formality but an essential preliminary to the mortgaged properties being brought to sale and all proceedings taken upon the decree without such order absolute are null and void. *Tara Prasad Roy v. Bhoodeb Roy.*, I. L. R., 22 C., 931 approved.

Appeal from the order of the District Court of Tinnevelly in A. S. No. 89 of 1897 reversing the order of the Court of the District Munsif of Srivaikuntam in C. M. P. No. 2014 of 1896 in O. S. No. 132 of 1895.

M. R. Ramakrishna Aiyer for appellant.

P. R. Sundara Aiyer for respondent.

The respondents brought a suit against the appellant on a hypothecation bond and obtained a decree on the 25th March 1895. The decree directed that the appellant should pay the decree amount within four months and that on default the hypothecated properties should be sold and the proceeds applied in payment of the money due under the decree. The respondents never obtained an order absolute for sale under S. 89, Transfer of Property Act, but brought the property to sale and purchased it themselves on the 10th April 1896, and the sale was subsequently confirmed on the 25th June 1896. The appellant put in this petition on the 13th November 1896 for permission to pay into court the amount due under the decree and to recover the properties. This application was granted by the District Munsif and the District Judge referred to the decisions in I. L. R., 17 Mad., 96 and I. L. R., 19 Mad., 40 nd held that the order absolute for sale under S. 89 was but a mere formality and that the sale was not invalid and reversed the decision of the District Munsif. From this decision the petitioner appealed.

* A. A. A. O. 35 of 1898. 19th Septembr 1899.

Subrahmanyam Pillai v. Narayana Aiyangar.

The Court delivered the following

JUDGMENT:—The decision of the District Judge cannot in our opinion be upheld. No order absolute for sale having been passed under S. 89 of the Transfer of Property Act and no application for such an order having been made to the court the decree of the 25th March 1895 was incapable of execution and all proceedings purporting to have been taken in execution of it must be held to have been null and void, I.L.R., 22 C. 931. We allow this appeal with costs and restore the order of the District Munsif under date the 22nd January 1897 in so far as it sets aside all execution proceedings which had taken place up to that date and directs redelivery of the property to the 1st defendant but set aside that portion of that order which directs that the decretal amount if paid into court by the 1st defendant shall be paid to the judgment creditor. The question as to whether the decretal amount can be received months after the period allowed for payment by the decree *nisi* under S. 88 of the Transfer of Property Act had elapsed is one that does not arise for decision now and cannot arise until an application for an order obsolute for sale is made to the District Munsif under S. 89 of the Transfer of Property Act. We do not interfere with the orders of the lower courts as to costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice O'Farrell and Mr. Justice Michell.

M. Sreedharan Somayajipad and another. } Appellants* *3rd and 4th Plaintiffs.*

v.

Paramatham Somayajipad and others. *Respondents.*

M. Sreedharan Somayajipad v. Paramatham Somayajipad.

Civil Procedure Code, S. 375—Compromise—Decree, finality of—Revision petition—Conversion into appeal—Civil Procedure Code, S. 30—Right of one of several Plaintiffs to challenge compromise.

In the course of an appeal pending before the District Judge, a petition No. 59 was put in by the Vakils of plaintiffs and defendants 3 and 4 requesting the Court to dismiss the appeal on the ground of an alleged compromise between the parties. On the other hand another petition No. 96 was filed by the 1st plaintiff and the 4th defendant denying that any compromise was ever made and asking the Court to

* S. A. 932 of 1899. 15th September 1899.

M. Sreedharan Somayajipad v. Paramatham Somayajipad

proceed with the appeal. The Judge upon a report by the District Munsif that he was satisfied that the parties had compromised dismissed the appeal and passed a final order on the petition No. 59 and another on both the petitions jointly in the nature of a judgment on the whole matter; but no order was passed on the other petition No. 96. This revision petition was then put in purporting to be against an order on petition No. 96, dated June 27, 1898. The order of that date was really on petition No. 59:—

Held that the revision petition might be treated as having been instituted against the order on C. M. P. 59, that an appeal lay against the dismissal of the appeal on the ground of adjustment out of Court where the parties denied that any adjustment was made or that the Vakils had any authority to make the compromise, that in the circumstances of the case the revision petition having been filed within the time limited for an appeal might be treated as such on payment of the proper court-fees, that the fact that the plaintiffs sued on behalf of a Sabha with the permission of the Court, under S. 30, Civil Procedure Code, did not deprive one of them of the right to challenge an alleged compromise to which one of many plaintiffs would ordinarily be entitled, and that the lower Court before dismissing the appeal should have taken evidence and satisfied itself that the compromise was assented to by the parties.

Goculdas Balabdas Manufacturing Company v. *Scott* I. L. R., 16 B., 202 and *Mahomed Wahibuddin v. Hakiman, I, L. R.*, 25 C., 757 followed.

Second appeal against the order of the District Court of South Malabar dated 27th June 1898 in Civil Miscellaneous Petition, No. 59 of 1898 in A. S. No. 571 of 1896 presented against the decree of the District Munsif's Court of Angadipuram in O. S. No. 503 of 1894.

C. Krishnan for appellant.

P. R. Sundara Aiyer for respondent.

The Court delivered the following

JUDGMENT:—In appeal No. 571 of 1896 before the District Court of South Malabar against the decree in O. S. No. 503 of 1894 on the file of the District Munsif of Angadipuram, a petition, No. 59 of 1898 was presented purporting to be on behalf of the plaintiffs and the 3rd and 4th defendants in the suit, by their respective pleaders, praying that the case might be struck off the file on the ground that the matter in dispute in the suit had been compromised by the payment by 4th Defendant to 1st Plaintiff of Rs. 1,923-15-6, on behalf of the Sabha, and both parties had agreed to pay their own costs. A counter-petition, No. 96 of 1898, was presented to the District Court by the 1st Plaintiff and the 4th

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Defendant, objecting to the compromise as not being binding on them, and praying that the appeal might be tried on the merits. Upon the former petition the District Judge passed the following order, dated 30th March 1898: "notice to the other parties to show cause why the Munsif should not be required to take evidence, in spite of the supposed compromise." Upon the latter petition his order, bearing the same date, was: "*Vide* Order on M. P. No. 59 of 1898." It appears that the District Munsif reported that he was satisfied that the parties had compromised.

The District Judge passed two final orders of the same date, 27th June 1898, one an order on the two petitions, Nos. 59 and 96 of 1898, taken together and the other an order on No. 59 alone. The order on Petition No. 59 alone is as follows: "The appeal will be struck off in accordance with the Munsif's report and the petition of the pleaders on both sides." The order on the two petitions, Nos. 59 and 96, taken together, allowed (the words are "I decline to dismiss") the former petition, and dismissed the latter petition. There are thus two final orders upon No. 59. No final order appears to have been passed on petition No. 96 separately. Probably the District Judge intended his so-called order on the two petitions taken together to be his joint judgment on both and the separate order on petition No. 59 to be the order, in the proper sense of the term, thereon, in which case, however, there should also have been a separate order (*proprio sensu*) on petition No. 96. The present Revision Petition before us purports to be a petition against "the decree or order" passed on the Petition No. 96 only, and there is no petition against the order passed on petition No. 59 separately or the order passed on petitions Nos. 59 and 96 taken together. The petitioner's vakil says it was by an oversight that the revision petition was made out as being made against the order on Petition No. 96 instead of against the order on Petition No. 59. The date of the order petitioned against is given, in the revision petition, as 27th day of June 1898 which is the date of the order on Petition No. 59 and as has been mentioned, no order of that date, and in fact no final order at all, appears to have been passed on Petition No. 96. The grounds of revision petition show clearly that it was against the order on Petition No. 59 that the petitioners meant to petition. Under these circumstances we think we may

consider the revision petition to be really a petition against the last mentioned order, an amendment being made in the revision petition by converting the number of the order petitioned against from '96' into '59'. M. Sreedharan Somayajipad v. Paramatham Somayajipad.

It is objected on behalf of the counter-petitioners in this revision petition that an appeal lay against the order of the District Judge allowing the application for striking the appeal before him off the file: The Petition for striking the case off the file on the ground of an alleged compromise (Petition No. 59 of 1898) was presented by two pleaders professedly on behalf of the plaintiffs and 3rd and 4th defendants respectively. It was signed by those two pleaders and by 1st plaintiff and 4th defendant, and by no other person. It has been held by this court that a compromise cannot be entered into by a pleader on behalf of his client without the express authority of the latter :—*Jagapati Mudaliar* v. *Ekambara Mudaliar,* I. L. R., 21 M., 274. One of the grounds of their revision petition is that the petitioners, the 3rd and 4th plaintiffs, were not parties to the alleged compromise, and were not bound by it, the plaintiff's Vakil's action without express authority from the petitioners not being binding on them. The revision petition thus impeaches the alleged compromise as not being a "lawful compromise," and, therefore, in our opinion, the petitioners could have appealed :—*See Goculdas Balabdas Manufacturing Company Limited* v. *Scott,* I. L. R., 16 B., 202, 212. We do not agree with the view expressed by the District Judge that, the suit being one brought by four plaintiffs, with permission given under Section 30 of the Code, jointly on behalf of the Sabha, the 3rd and 4th plaintiffs have not the same right which one of several plaintiffs might ordinarily have to challenge an alleged compromise.'

The Petitioner's vakil asks that, if an appeal is held to have lain, this petition may be treated as an appeal, as it was presented within the time allowed for an appeal, and he refers to *Mahomed Wahibuddin* v. *Hakiman,* I. L. R., 25 C. 757 at p. 778. We think, under the circumstances, we may properly accede to this request on the understanding that the proper court-fee for the appeal be put in on or before the 8th September 1899.

Upon the merits, we think that the alleged compromise not having been shown by evidence to have been entered into by the

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3rd and 4th Plaintiffs or by any one duly empowered to enter into it on their behalf, the District Judge was wrong in treating the alleged compromise as a "lawful compromise." It appears from the District Judge's so-called order on the Petitions Nos. 59 and 96 taken together, that both he and the District Munsif declined to allow evidence to be given as to whether 3rd and 4th Plaintiffs joined in or consented to the compromise. We agree in the view taken by the learned Judges of the Bombay High Court in the *Goculdas Balabdos Manufacturing Company Limited v. Scott* I. L. R., 16 B., 202, that where an alleged agreement or compromise is impugned by a party to the suit sought to be bound by it, the court must satisfy itself by evidence taken that the agreement or compromise is a lawful one, before it can proceed under section 375 to record it and pass a decree in accordance therewith. In that case the agreement was challenged on the ground that some of its terms had not been consented to by both parties to the suit; but the principle is the same, whether the legality of the compromise be called in question on that ground or, as in the present case, on the ground that some of the parties to the suit have not consented to the compromise. See also *Appasawmy* v. *Manikam* I. L. R., 9 M., 103. We therefore reverse the order of the District Judge passed on Petition No. 59 of 1898 on the file of his Court, and direct that he either take, or cause the District Munsif to take evidence on the question whether the alleged compromise was entered into by the 3rd and 4th Plaintiffs and that after such evidence has been taken he do proceed according to law; costs of this petition will abide and be disposed of on the final determination of the proceedings in the Appeal No. 571 of 1896 on the file of the District Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. S. Subramania Aiyar, Officiating Chief Justice, and Mr. Justice O'Farrell.

In Appeal No. 150 of 1898.

Srinivasa Thathachariar and others ... Appellants* (*Defendants.*)

v.

Srinivasa Aiyangar and others ... Respondents (*Plaintiffs.*)

In Appeal No. 171 of 1898.

Srinivasachariar and another ... Appellants (*Plaintiff.*)

v.

Srinivasa Thathachariar and others ... Respondents (*Defendants.*)

Srinivasa Thathachariar *v.* Srinivasa Aiyangar & Srinivasachariar *v.* Srinivasa Thathachariar.

Religious office—Office-holders—Community or class, compellable to perform the duties of office—Civil Procedure Code, S. 11—Extent of court's interference.

Under S. 11 of the Code of Civil Procedure, Civil Courts have jurisdiction to entertain suits relating to infringements of rights connected with an office.

The members of an ill-defined community such as the Vaishnavas cannot all be the holders of the Adhyapakam office. They may be entitled to join in the recitation of the *prabandhams* during the hours of worship, but only those of them that are attached to the temple and are compellable by the temple authorities to perform the duties of the office are the holders of the *Adhyapakam* office.

In suits relating to religious offices, the civil courts ought not to interfere with or decide anything in reference to the rituals or ceremonials except so far as might be necessary for the protection of the office-holders in the exercise of their rights.

Appeals from the decree of the Temporary Subordinate Judge's Court of Tinnevelly in O. S. No. 2 of 1896.

The facts appear from the judgment of *Subrahmania Aiyar,* O. C. J. The decree of the Subordinate Judge runs as follows, (the italicised portion being that which is directed to be modified or omitted by the High Court) "............ it is ordered and decreed that it be declared, that *the plaintiffs and the other Tenkalai residents of Srivilliputtur* are entitled to *exercise the Adhyapakam right* in Nachiar and Vatapatra Sayanar temples of Srivilliputtur and in the surrounding temples attached to them and the shrines of Alwars and Acharyas, &c., attached thereto together with the shrines of Natakasala Thiruvenkatamudayan and Thirumalai Thiruvenkatamudayan, Alagarkoil *alias* Sundararayan Shrine,

* A. N. P., 150 and 171 of 1898. 12th September 1899.

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Krishnankoil and Rengatirtham, &c., and at Mandapams on the occasion of puja and festival inside the temple and during processions of gods along the streets, *i.e., that as the stanika recites 'the Arulipat, the first Tirthákar, (the Anagac, the Periathambi and the remaining Tirthakars together with the other Tenkalais have the right to repeat the word "nayinde" "nayinde" then recite the Tenkalai mantram "Srisailesa Dayapatram" and thereupon recite the Tamil prabandham and conclude the service with the recitation of the said mantram and the recitation of the "Vazhi Tirunamam" on the occasion and at the temples and shrines aforesaid and that the defendants and the other Vadakalai residents also of Srivilliputtur have the right to join in the Seväkâlam from the commencement of the recital of "nayinde" but that the Vadakalais are not entitled to repeat their Ramanuja Dayapatram or Vazhi Tirunamam either at the beginning or at the end of the Sevakalam either separately or jointly with the Tenkalais."*

V. Krishnaswami Aiyar for appellants. *

S. R. Rama Subba Aiyar, P. R. Sundara Aiyar and *M. A. Tirunarayana Chariar* for respondents.

The Court delivered the following

JUDGMENT :—*The Officiating Chief Justice* :—Certain Thenkalai Aiyangars of Srivilliputtur in the Tinnevelly District brought a suit, having obtained permission, under S. 30 of the Code of Civil Procedure, against certain Vadakalai Aiyangars of that town praying first for a declaration of the right of the plaintiffs and other Tenkalais possessing specified qualification, to an office known as Adhyapakam—connected with the recitation of Tamil compositions, spoken of ordinarily as prabandhams, during worship carried on according to the usage of the temple in Srivilliputtur, and secondly for an injunction restraining the Vadakalais from infringing the rights of the Thenkalais by taking part in the recitation of the said compositions and uttering on such occasions certain words called *Rámánuja Dayápátram* or the formula used by Vadakalais to invoke one of their gurus or saints while *Srisailesa Dayápátram* or the Thenkalai formula is the only one to be properly used at the recitation.

The Subordinate Judge held that Thenkalais and Vadakalais,

* In A. 150 of 1898.

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possessing the requisite qualifications were alike entitled to join in the recitation and made a declaration accordingly. As to the *pátram*, however, his decision was entirely in favour of the Thenkalais and the defendants were prohibited from uttering the Vadakalai formula during the customary worship.

The plaintiffs and defendants respectively appeal against the decree in so far as it is against them and the points arising for consideration in these appeals taking them together are,

(1) Does the alleged *Adhyapakam* office exist?

(2) If there is such an office who are the persons entitled thereto?

(3) Are the Vadakalais entitled to utter their *pátram* on the occasions in question?

Now as to the first point, the defendants apparently admitted in the lower Court from the beginning that the alleged office did exist. Some of the averments in their written statement seem to support that view. Even if those averments be taken to be not quite free from ambiguity, it is clear that the existence of the office was distinctly admitted at the trial. The point is also established otherwise. Now the prabandhams, alluded to, are looked upon, at all events by Thenkalais, in the light of the Vedas. Hence the practice which prevails in this temple, as well as in other similar institutions of reciting these prabandhams during the daily worship and on special occasions as festivals. Considering that the recitation is part of the established ritual it is not easy to believe that the work of recitation would, as urged on behalf of the Vadakalais, have been left to be done at the mere will and pleasure of worshippers present. On the contrary, it is highly probable that care would have been taken to make it incumbent on particular individuals to do the work. Consequently, great weight is due to the evidence which shows that to recite the prabandhams is among the duties of certain paid hereditary office-holders falling under the designation of *Thirthakars* and certain other office-holders in the temple, the plaintiffs being among those who have to perform such a duty. The contention of the Vadakalais that no Adhyapakam office exists is, therefore, quite untenable. It is unnecessary to notice the authorities cited on behalf of the

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Vadakalais as none of them in reality affects the rule that an action lies in respect of infringements of rights connected with an office such as that in question.

As to the second point, it will be seen from what has just been said that the *Thirthakars* are doubtless among those entitled to the office and there is no reason to doubt that as asserted by the Vadakalais the Thathachars who are Vadakalais—are also *Thirthakars*. The suggestion made on behalf of the Thenkalais that though the Thathachars are in the matter of Thirtham or sacred water treated like other admitted *Thirthakars*, yet the Thathachars are not among the real *Thirthakars* in the temple has no foundation whatever. The Subordinate Judge was consequently clearly right in holding that the Thathachars also were entitled to the office.

But his view that ordinary worshippers of either sect belonging to Srivilliputur, but not holding any definite position in the temple such as is held by Theerthakars, &c., mentioned above, are Adhyapakam office-holders seems open to question. Now the term, *office*, in the sense with which we are concerned, implies, of course, a duty in the office-holder to be discharged by him as such—see if authority were necessary, Kent's Commentaries where it is pointed out "offices consist in a right, and correspondent duty, to execute a public or private trust and to take the emoluments belonging to it" (13th Edition; Vol. III, bottom page 647). But no member of the class, under consideration, is subject to any duty in the matter as admittedly, though any such member may if he likes attend and take part in the recitation, he is not bound to do so. Therefore it is not easy to see how any of this class of persons can rightly be said to be an Adhyapakam office-holder. It must not, however, be understood that the Subordinate Judge's conclusion that all the Vadakalais have, like the Thenkalais in general a right to join in the recitation is dissented from, since that conclusion is amply supported by the evidence of the independent witnesses and the circumstances and probabilities discussed at length by the Subordinate Judge.

Lastly, as to the question whether the Vadakalais are entitled to utter their *pátram* on the disputed occasions, there is much conflict of evidence. Is the evidence on behalf of the Thenkalais

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that their *pátram* only should be used or is the evidence on behalf of the Vadakalais that the *pátrams* of both the sects are to be used entitled to credit ?

Now judging from the instances of dispute between Thenkalais and Vadakalais which have come not unfrequently before the courts in connection with other temples, the rule seems to be that but one *pátram* is used on similar occasions. It seems, therefore, not very likely that in the case of the present temple the practice is to use more than one *pátram*.

That in connection with other parts of the worship only the Thenkalai *pátram* is used, as stated in paragraph thirty-five of the judgment of the Subordinate Judge, and that the Ariar whose function it is to begin and conclude the recitation in due form, is himself a Thenkalai are strong circumstances which tend to show that the testimony in favour of the case of the Thenkalais is more probable. The contention of the Vadagalais on the point appears, therefore, to have been rightly rejected by the Subordinate Judge.

The appeals fail substantially and must be dismissed with costs, subject however to the lower Court's decree being modified, as particularised in the judgment of my learned Colleague with reference to the view taken here as to the persons entitled to the office in question.

O'Farrell, J.—I concur with the learned Officiating Chief Justice in the order proposed and in the reasons given by him for that order.

With regard to the distinction which he draws between an office and a mere act of worship, it appears to me to be a distinction of great importance, which has not always been sufficiently attended to. For reasons that I need not go into, there is a growing tendency to bring before the civil courts disputes on matters of religion not properly within their province. With that object allegations are made that offices exist the holders of which consist of all the members of a particular community or sect or those members of the sect or community who possess certain attainments, such as knowledge of the *Vedas* or the *Prabandhams* or the like. I find it difficult to conceive of an office being held by all the

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members of an ill-defined class or community and I have little doubt that, in most cases, at least, the allegations are simply an attempt to introduce a legal fiction which would clothe the civil courts with a jurisdiction they would not otherwise possess. I think that in all cases of this kind strict proof should be required of the existence of an office and that the persons who allege that they are office-holders are really such. In order that an office may exist there must be a duty enforceable by deprivation or other temporal sanction. Where there is no duty or a duty enforceable merely by moral or social sanctions, there can be no office.

In the present case I have no doubt, on the evidence, that an office exists called the Adhyapakam office and that there are persons remunerated for performing its duties and compellable by the temple authorities to perform them. Whether the remuneration they get was originally granted for other services that they perform in the temple or not appears to me to be a matter of antiquarian rather than practical interest. It is sufficient that they perform the duties of the *Adhyapakam* office and are compellable to perform them. As regards the other class of persons who are described in the plaint as "the Thenkalai Sri Vaishnava Brahmans who are permanently residing in Srivilliputtur" and the similar class of Vadakalai Brahmans among the defendants, it is quite clear for the evidence that they may attend and join in the recitation of *prabandhams* or not as they please, and that the temple authorities have no control whatsoever over them in this respect. When they choose to attend and recite the prabandhams they in common with the remunerated office-holders and the *Archakas* receive a certain insignificant portion of the sacred rice known as *Killu Prasadam*. This distribution is made at the temple and during or at the close of worship, and is evidently a mere honour and not a remuneration for services performed.

I agree with the learned Officiating Chief Justice that there is an office of *Adhyapakam* and that the plaintiffs are office-holders. I agree with him that the other *Thirthakars* including the defendants 1, 3, 6, 10, 11 and 12 are also office-holders.

As the decree of the Subordinate Judge stands, however, it is too wide and I find a difficulty in confirming it in its entirety. For

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the words "plaintiffs and other Thenkalai residents of Srivilliputtur" I would substitute "plaintiffs and other *Thirthakars* including the defendants 1, 3, 6, 10, 11 and 12. For "exercise the Adhyapakam right" I would substitute "perform the duties of the *Adhyapakam* office." I would expunge all the portion of the decree from and after the words, "*i.e.,*" down to "shrines aforesaid" which describe the ritual for this reason that it is a matter with which a civil court has no concern except for the purpose of protecting the office-holders in the exercise of their office. For the passage "the defendants and other Vadakalai residents also of Srivilliputtur *have the right*" I would substitute "provided that they shall not be entitled to restrain worshippers whether Vadakalais or Thenkalais from joining in the Sevakalam from the commencement of the recital of "Nayinde"; but that the Vadakalais shall not be at liberty to interfere with the performance by the plaintiffs and other holders of the *Adhyapakam* office by repeating their "*Ramanuja Dayapatram*" or "*Vazhi Tirunamam*" either at the beginning or at the end of Sevakalam. The words "either separately or jointly with the Thenkalais" seem unnecessary and the word "jointly" is inaccurate as the Thenkalais do not repeat those formulæ at all. These words may be left out.

Subject to these modifications of the decree which do not substantially vary it, but which I think necessary in order that the civil courts may not appear to be exercising a jurisdiction which they do not possess, I would dismiss both these appeals with costs.

IN THE HIGH COURT OF JUDICATURE OF MADRAS.

Present:— Mr. Justice Boddam and Mr. Justice Michell.

Ramayya and another ... Appellants* (*Plaintiffs.*)

v.

Krishnamma and another ... Respondents (*Defendants.*)

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Documents—Construction—Mortgage by Conditional Sale—Sale with a condition for repurchase—Evidence Act, S. 92.

Instruments creating a mortgage by conditional sale executed after the date of the Privy Council decision in *Thumbusami* v. *Hussain*, I. L. R., 1. M., 1, and before

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* S. A. 1500 of 1898. 26th September 1899.

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the Transfer of Property Act came into force should be construed with reference to the law laid down by the series of decisions of the Madras High Court beginning from 1858 and not according to the strict law prevalent in India before 1858 and approved by the Privy Council in the decision above-mentioned. The contract of mortgage so created does not, therefore, perfect into an absolute sale on the breach of the condition for repayment but still continues a mortgage, subject to the mortgagor's right to redeem within the period of limitation prescribed therefor.

Where from a sale deed and a deed of defeasance taken together, it was evident that there was an outstanding recoverable debt between the parties, and that the possession of the properties was to continue in the transferor and not to pass to the transferee and the consideration for the contract was recited to be an existing debt and not a price settled:—

Held that the documents together constituted a mortgage by conditional sale and not a sale with a condition for repurchase.

Held also that having regard to S. 92, Evidence Act, a registered instrument cannot be cancelled except by another registered instrument. *Umedmal* v. *Motiram*, I. L. R., 2 B., 547, approved.

Second Appeal from the decree of the District Court of Ganjam in A. S. No. 136 of 1897 reversing the decree of the Court of the District Munsif of Chicacole in O. S., No. 673 of 1895.

The material portions of the documents the construction of which was in question in this appeal was as follow:—

"Being unable to discharge the debt of Rs. 230 already due to you, I hereby sell to you in satisfaction of the said debt my *zerayati* lands of about 6 acres * * * * . You may henceforward enjoy the produce thereof absolutely as your own."

"In discharge of the debt of Rs. 200 due to me I have obtained a sale of your zerayati lands * * * * * * . Should the whole debt due from Chitrabhanoo up to the 30th Pushyam of Virodhi be paid with interest * * * , I shall transfer the above lands in your favour and have my sale-deed cancelled and returned to you. On the 30th Pushyam every year during the period of stipulation, a sum of Rs. 33 should be credited towards principal and interest. In case I (1) fail to pay Rs. 33 every year accordingly, I (1) shall be liable to pay the whole without any reference to the instalments yet due. If you fail to do so, this counter-deed must be held to be cancelled and I shall take possession of the lands as per sale-deed."

These documents were both executed on the 26th June 1882.

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(1) Apparently for "you" as remarked in the judgment of the High Court.

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The transferor now brought this suit to recover the properties on the allegation that the documents constituted a mortgage by conditional sale, and that the amount due on the mortgage was discharged by some instalments paid and the profits of the property which the mortgagees trespassed upon in the year 1888 and enjoyed ever since that date. The District Munsif held that the documents constituted a mortgage and that the mortgage amount having been discharged the plaintiff was entitled to recover the property. On appeal, the Subordinate Judge held that the true construction of the documents was to consider them as constituting a sale with a condition for re-purchase and dismissed the suit on the ground that the sale became absolute on plaintiff's default to pay the money within the stipulated period; and hence this appeal.

P. R. Sundara Aiyar for appellant.

C. Krishnan, for *N. Subrahmanyam* for respondents.

The Court (*Collins,* C. J., and *Michell,* J.) made the following

ORDER:—The District Judge has not recorded findings upon some of the material issues.

We must, therefore, request him to record his findings on issues 1 to 6 and return his findings thereon to this Court within two months after the re-opening of the Court after the recess and seven days will be allowed for filing objections after the findings have been posted up in this court.

After the return of the finding of the lower appellate Court upon the issue referred for trial. The Court delivered the following final

JUDGMENT:—The two documents sued on Exhibits I and II which must be taken together as constituting one transaction, were both executed on 26th June 1882, that is, before the Transfer of Property Act came into force. In accordance, therefore, with what was indicated by observations of their Lordships of the Privy Council in *Thambusami Mudali* v. *Hussain Ravuthan,* I. L. R., 1. M. L. R., 2 I. A., 241, that transaction should, I think, be regarded as having been entered into by the parties thereto with reference to the law as propounded in the course of Madras deci-

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sions commencing in 1858 referred to in that case, and the documents must be construed accordingly. Though the documents now under consideration were executed in 1882, that is about seven years after the decision of the Privy Council in *Thambusami Mudali* v. *Hussain Ravuthan* which was passed in 1875, they must, I think, be construed similarly as documents executed before 1875 but not before 1858, because the supposed effect of the current of Madras decisions between 1858 and 1875 cannot, I think, be considered to have been removed by the Privy Council Judgment in *Thambusami Mudali* v. *Hussain Ravuthan* so as that documents executed subsequently to that judgment and before the Transfer of Property Act came into force should be construable as having been made with reference to the law as it existed before 1858 and as approved by the Privy Council in that Judgment. The question, therefore, is whether regard being had to their terms these documents (taken together) construed agreeably to the law enunciated by the series of decisions which began in 1858, constituted a sale which was subject to a condition at first, but which became absolute on default made by the transferor in paying the debt of Rs. 200 by the 30th Pushya Bahula of Virodhi or a mortgage, the transferor having an equity of redemption after the period expressly fixed had expired without such payment being made.

It appears to me that the real intention which the terms themselves of these documents show is that of securing the repayment of the debt mentioned therein and nothing more. The consideration is not stated to be the price of the property transferred, but a debt of Rs. 200 which the transferor owed but was unable to pay to the transferee.

In the case of *Ibrahim Bhai* v. *Fletcher and others*, I. L. R., 21 B., 828, relied on by the respondent's counsel the document in question recited the fact that a sale of certain land by the one party to the other which had been mortgaged by the former to the latter was to have been effected because the parties could not come to an agreement as to the price, but that they had then come to an agreement and settled the price. It proceeded to state that Rs. 200 was due in respect of the mortgage, and that the price of the land which had been mortgaged was Rs. 125 and provided that if the transferor paid this sum with interest within five years he was to have

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back that land but if he failed so to pay that land was to become absolute property of the transferee and that for the Rs. 75 balance the transferor was to be personally liable and if he failed to pay it within one year he was to give the transferee another piece of land. One of the points to which the judgment in the case shows that the court attached considerable weight in deciding that the transaction was a sale and not a mortgage, was the fact that the conveyance of the land purported to be made for a price fixed by the parties as the value of the land, and not as security for payment of a debt.

Then there is a personal obligation imposed on the transferor to repay the debt with interest "On the 30th Pushya Bahulam of each year up to the expiry of the term you should be paying Rs. 33 towards the principal and interest of the amount referred to above. In default of such payment during any year," I (here clearly, I should be "you") shall pay the whole amount due without laying any claim to future instalments" (*sic.*)

Though these provisions are contained in the document which was signed by the transferee they are equivalent to a covenant by the transferor to repay, because the two documents being parts of one transaction, both the parties were bound by or could take advantage of every stipulation whether contained in the one or the other of the two documents just as they could have done if the transaction had been embodied in a single document. The provisions of Exhibit II just now quoted are followed immediately by the following provision. "In default of payment even in that manner "I should credit the land (to myself) according to the sale-deed after getting this counter-deed cancelled." This latter provision cannot, I think, be properly construed as meaning that the right against the property given to the transferee thereby shall be his only right on occurrence of the default on the part of the transferor to pay, thus negativing the right to recover the debt from the transferor personally which would otherwise have been created by the immediately preceding provisions. There is no more reason, I think, for regarding this construction as the right one, than there would be in the case of a simple mortgage for construing the provision entitling the mortgagee to bring the property to sale on default made by the mortgagor in payment as nullifying the mort-

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gagee's right under the mortgagor's preceding covenant, to pay to proceed against him personally. The transferee thus has in my opinion under the documents a right to recover the debt (with interest) from the transferor personally, whereas in *Bapuji Apaji* v. *Senavaraji Marvadi*, I. L. R., 2 B., 231 (see at p. 246) which was also relied on by the respondent's counsel there was nothing in the documents there in question giving such a right to the transferee and the absence of any such provision was one of the grounds on which the Court held the transaction in that case not to be a mortgage.

Then by the effect of the two documents taken together possession of the lands was, we think, to remain with the transferor. Under Exhibit I indeed, it is provided "you" (the transferee) "may henceforward permanently and hereditarily enjoy the crops thereof according to your will. But Exhibit I forms part of the entire transaction. It is controlled by Exhibit II from which we think it appears that the transferor was to retain possession. For he is to pay interest on the debt, year by year, for eight years and as observed by the District Munsif it could hardly be that 1st defendant was to have both the usufruct of the lands and also interest on the debt and there is no provision in Exhibit II for 1st defendant accounting to the transferor for the profits upon the lands becoming the absolute property of the former in default of payment by the transferor in the manner provided. Moreover, defendants admit in their written statement that plaintiff's father was in possession for one year, Chitrabhanu corresponding with 1882—1883 while plaintiff's case is that 1st plaintiff's father and 1st plaintiff were in possession up to the end of Sarvajit (1887—1888) when 1st defendant usurped the lands. Evidence of the conduct of the parties in connection with and at or immediately after the time of the transaction comprised in the documents is admissible for the purpose of construing the terms of the documents. I am, therefore, of opinion that Exhibits I and II together constituted a mortgage.

On the question, the subject of the first issue, whether Exhibit II was cancelled and returned as stated by defendants, the District Judge has recorded no decisive finding. He says "It was cancelled and returned by defendants (*sic*) most probably and

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then gives his reasons. It is, however, immaterial what the finding on this issue might be, because the next, the second issue, *viz.*, whether such cancellation was valid—a question of law must be decided in the negative. Exhibit II being a registered document it is clear that it could not be cancelled except by a registered document (Evidence Act, Sec 92 Proviso 4 *Umedmal Mortiriam* v. *Davubin Dhenipa* (I. L. R., 2 B. 547) and admittedly there was no such document. The District Judge thinks that Exhibit II "cancelled itself" because of the stipulation therein that in default of payment in the manner provided the transferee should credit the land to himself and the fact that such payment was not made, and therefore decides the third issue in the affirmative; but in the view which I take that exhibits I and II together constituted a mortgage, the District Judge's opinion that Exhibit II thus "cancelled itself" is untenable. Besides the second issue is as to the validity of the alleged cancellation which forms the subject matter of the first issue and does not include the question whether Exhibit II "cancelled itself."

On the 4th issue the District Judge finds that plaintiff's father did borrow from 1st defendant, in addition to the original debt in respect of which Exhibit I and II were executed, a further sum of Rs. 200 and that the lands dealt with by those Exhibits were made liable for that sum also. So far as that is a finding of fact we cannot interfere with it, but so far as it involves a decision that the lands were, as the legal effect of the transaction made liable for this further sum, it cannot in our opinion be upheld. For if, as appears to have been the case, it was meant to make the land liable for this further advance similarly as it had been made liable under exhibits I and II for the original debt, it would not have been a case of a mere charge falling under S. 100 of the Transfer of Property Act, but a further mortgage of the land and a registered instrument would have been necessary to make the transaction valid, it having apparently taken place after that Act came unto force.

On the 5th issue the District Judge finds that all the money due to 1st defendant has been discharged. On the 6th issue the District Judge finds, as did the District Munsif that no improve-

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ments were made. These are findings on questions of fact and cannot be disturbed on second appeal.

The 3rd issue is "To what relief is plaintiff entitled?"

This appeal should, therefore, in my opinion, be allowed and the decree of the District Judge should be reversed and that of the District Munsif restored, and the defendants should pay the plaintiff's costs in the lower Court and in this Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. S. Subrahmania Aiyar, Officiating Chief Justice, Mr. Justice Moore, and Mr. Justice O'Farroll.

Subrahmania Aiyan ... ... Appellant* (*2nd Deft*).

v.

Krishnayyan, and another ... Respondent (*Plff.* and *1st Deft*).

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Mortgage—Alteration in material part—Suit for sale—Cause of action—Transferred right—Altered instrument—Condition precedent—Construction of document.

Where the material part of a mortgage deed ran as follows, "We shall pay you the said sum of Rs. 2,000 on the 3rd September 1894, which is the third year or before that time or on any other day on which the security deed is executed either by you or by any other person on property worth Rs. 2,000 and free from all incumbrances whatever. If within the said fixed date the security is not furnished and the amount received, you shall receive the principal sum without interest for the period subsequent to that on the day on which the security is furnished," and the document was altered by the mortgagee without the consent of the mortgagor by the insertion of the words "for the minor only" at the end:—

Held that the document was altered in a material part and that a suit upon the altered instrument would not lie, but that (*O'Farrell* J. diss.) since the right to bring the properties to sale which became vested as soon a valid mortgage was executed might be said to have been the basis of the suit, the suit could be maintained and the instrument so far as it was unaltered might be received in evidence of the rights of parties.

Held also (*O'Farrell*, J, *dissentiente*) that upon a proper construction of the instrument the suit was maintainable without the previous tender of a proper deed of security.

Per *Subrahmania Aiyar* J:—The execution of the deed of security is not a condition precedent to the payment of Rs. 2,000. The meaning of the terms is that the money should become unconditionally due on the 3rd September 1894 and that payment of the money might be insisted upon even before that date if the security deed is furnished earlier. The only penalty for not giving security before the fixed date is that he should lose all right to interest subsequent to that date.

Per *Moore* J.:—The execution of the deed of security is not a condition precedent to the maintenance of the suit, as the terms of the bond will be satisfied even

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* Second Appeal No. 613 of 1898. 16th August 1899.

if the security deed in proper form is executed after the date of the decree in this suit. Subrahmani Aiyan v. Krishnayyaan

Per O'Farrell J.:—The execution of the deed of security is a condition precedent to the maintenance of this suit. As no proper security bond has been tendered before the date of the plaint, the suit should be dismissed.

Second appeal from the decree of the Subordinate Judge's Court of Kumbakonam in A. S. No. 493 of 1897.

The plaintiff sold certain property to the 1st defendant's husband for Rs. 4,000. It was agreed between them at the time that the plaintiff should furnish security for Rs. 2,000, to indemnify the vendee as against all claims that might be set up to the properties. The plaintiff immediately received only Rs. 2,000 and took a mortgage of the properties for the balance of purchase money. The material portion of the document ran as follows:—'We have hypothecated to you the undermentioned lands and house sites * * * which are also mentioned in the deed of absolute sale executed to us by you for Rs. 4,000 * * * * and have borrowed from you Rs. 2,000 as per particulars mentioned in the sale-deed. We shall pay you interest for the above said sum for 3 years from this day at ½ per cent. per mensem paying the interest of each year on the 3rd September of each year. We shall pay you the said sum of Rs. 2,000 on the 3rd September 1894 which is the third year or before that time or on any other day on which a security deed is executed either by you or by any other person on property worth Rs. 2,000 and free from all incumbrances whatever. If within the said fixed date the security is not furnished and the amount received, you shall receive the principal sum without interest for the period subsequent to that on the day on which the security is furnished. If the interest due for every year within the said 3 years be not paid at the time so fixed we shall add interest to the interest at the rate of 10 per cent. per mensem. The sum for which security has to be furnished as said above is Rs. 2,000. A security should be furnished for this sum of Rs. 2,000 *"for the minor only."* He now brought this suit against the 1st defendant and her vendee on the allegation that he had done his part of the agreement, that is, he had executed and registered a security bond and that the 2nd defendant, vendee, refused to pay the money notwithstanding repeated demands. The 1st defendant remained *ex parte*. The 2nd defendant contended that he had no proper notice from the plaintiff,

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that the security furnished was insufficient, that the last words of the document, namely, "for the minor only" was an unauthorised addition to the words of the document subsequent to its execution and that, therefore, there being an alteration in a *material* part of the document the suit was unsustainable.

The District Munsif considered that there was a material alteration, and that the suit should be dismissed.

The Subordinate Judge, however, considered the alteration immaterial and decreed the plaintiff's suit. Hence this appeal.

P. R. Sundara Aiyar and *K. Ramachandra Aiyar* for appellant.

V. Krishnaswami Aiyar for 1st respondent.

This second appeal came on for hearing on Tuesday, the 14th February 1899, before (*Sir Arthur J. H. Collins*, Kt., Chief Justice and Mr. Justice *Benson*) when their Lordships made the following.

ORDER:—We are unable to accept the view of the Subordinate Judge that the alteration of Exhibit A by the addition of the words "for the minor only" is not a material alteration. It may be that by the execution of Exhibit C the plaintiff gave the security therein mentioned as a guarantee against claims by Mangalathammal and other incumbrances, but that is no reason why he should not have been also required by the mortgagors under Exhibit A to give further security in general terms as a guarantee not only against the son's posssible claims but also against the claims of Mangalathammal and other incumbrances already guaranteed by Exhibit C to the extent of the property therein mentioned. The property in Exhibit C might prove an insufficient security, and the mortgagors might reasonably have thought fit to obtain a further security. Such further security was given in general terms by Exhibit A before the words "for the minor only" were added. The addition of those words restricted the liability of the property in that document to claims made by the son of the plaintiff. It diminished the guarantee given by the plaintiff against claims by Mangalathammal and other incumbrances. It was thus an alteration in a most material part of the document *Govindasami* v. *Kuppusami* (I. L. R., 12 M. 239,) and would vitiate it as a basis for the plaintiff's suit, unless the

plaintiff could shew that the alteration was made with the consent of the mortgagors who executed the document.

On this question the finding of the Subordinate Judge is by no means distinct. We must ask him to return a finding on this point within six weeks from the date of receipt of this order.

We observe that two of the witnesses who attested the document have not been examined, nor does it appear that their evidence is not procurable. In a case like the present it is highly desirable that all available evidence as to the circumstances under which the alteration was made should be exhausted. The Subordinate Judge should therefore examine these witnesses if their evidence is available.

Seven days will be allowed for filing objections after the finding has been posted up in this Court.

[The Subordinate Judge returned the finding that the alteration was made without the consent or authority of the mortgagors.]

The Court, on receipt of the finding, delivered the following.

JUDGMENTS :—*The Officiating Chief Justice* :—The first point for decision is whether the addition of the words "for the minor only" in the sentence 'a security should be furnished for this sum of rupees two thousand,' which occurs at the end of the mortgage instrument Exhibit A, bearing date the 4th September 1891,—an addition now found to have been made wrongfully after the instrument was duly executed and registered—precludes the mortgagee, the 1st respondent (plaintiff) from seeking as against the appellant (2nd defendant), claiming through the mortgagor, a sale of the mortgaged property for the mortgage money, assuming for the present that the money had become due on the 3rd September 1894 notwithstanding the failure on the part of the first respondent to execute a security bond as provided in the mortgage instrument.

Now it is unquestionable that on the execution of Exhibit A an interest in the property, comprised therein, became at once vested in the first respondent, that such interest was not and could not have been devested from him by the subsequent addition of the

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words referred to and that one of the incidents annexed by law to the interest so vested, is a right to have the property sold through Court should the mortgagor or other person bound to pay the mortgage money fail to pay it. Therefore, in asking for the sale of the land, it is obvious that the 1st respondent is seeking to enforce, not a right resting on contract or convenant, but one arising by operation of law with reference to a vested interest created by the instrument having been executed. It is true that reference is made in the plaint to the provisions relating to the security bond in Exhibit A as altered. But such reference is not an essential part of the 1st respondent's cause of action in the view I take of the effect of the provisions relating to the security, on the respondent's right. I am, therefore, unable to say that the suit is to be taken as necessarily based on the altered instrument. The case is, under the circumstances, in principle, similar to *The Agricultural Cattle Insurance Company* v. *Fitzgerald,* where it was held that though the deed of settlement of the Company had, since its execution, been altered by the erasure of the name of a shareholder subscribed before that of the defendant, still the deed was available as evidence in an action for calls against the defendant. Lord *Campbell* C. J. said "This is not an action on the deed but upon the Act of Parliament which renders the defendant liable to be sued in this form (debt) if he was a shareholder when the calls were made. His execution of the deed shows that he was then a shareholder; and the erasing of the name of another shareholder rightfully or wrongfully could not devest from the defendant the shares which he before held. The deed therefore was evidence that he was a shareholder when the calls were made" (*Attorney General* v. *Marquis of Ailesbury* 16 Q. B. 432 at p. 441). Similarly in the present case the addition of the words 'for the son only' could not and did not devest from the first respondent the mortgage interest already vested in him and the instrument in question is evidence of such interest entitling him to enforce the incidental right of selling through Court annexed to the interest by the law. Be this as it may, *Ramasawmy Kon's* case (3 M. H. C. R. 247), in so far as it is unaffected by the Full Bench decision in *Christa charlu* v. *Karibasayya* (I. L. R., 9 M. 399), and the very clear observations, to be found in the latter case itself, bearing on the present question, are distinct and direct authorities in favour of the view that the first respondent is not precluded from enforcing

his mortgage right against the appellant to the extent sought by him.

The other point for determination is whether the execution of the security bond, referred to in Exhibit A as it stood before it was altered, is a condition precedent to the accrual of the right to payment of the mortgage money. This is of course a question of construction, the intention of the parties being collected from the whole instrument. Now the most important passage bearing on the point runs thus:—"We shall pay you the said sum of rupees two thousand on the 3rd September 1894, which is the third year, or before that, on the day on which a security deed is executed by you or any other person on good immoveable property which is worth rupees two thousand and which is not subject to any claim or dispute." The obvious meaning of the parties is that the sum of rupees two thousand was to become payable *at all events* on the 3rd September 1894, though payment thereof might be claimed even before that date should the first respondent execute or cause to be executed a security bond of the description mentioned in the instrument. That the two thousand rupees were to be *paid unconditionally* on the 3rd September 1894 would seem to be pointed to even by the terms of the instrument as to interest on that amount. They are as follow:—"As we owe you this sum of rupees two thousand, as per particulars mentioned in the sale-deed, we shall pay you interest for the above said sum for three years from this day at ½ rupee per cent. per mensem, paying the interest of each year on the 3rd September of each year". * * * "If perhaps within the said fixed date (3rd September 1894) the security be not furnished and the amount received, you shall after that date, on the date on which security is furnished, receive from us the principal alone."

The intent of the parties would seem to be that failure on the first respondent's part to furnish security will entail on him only the loss of interest subsequent to the 3rd September 1894, but will not affect in any way his right to interest prior to that day or to the payment of the principal which, as already stated, was taken as accruing due unconditionally on the 3rd September. If it were otherwise the parties would surely have stated in express terms that apart from the loss of interest the principal amount too could not be demanded until the security is furnished,

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As to the statement in the plaint bearing on the question of the security bond they are averments of the plaintiff's readiness to perform his covenant in the matter—a covenant the breach of which would entitle the mortgagor to claim a set-off for the damages caused thereby. I am unable to hold that the statements in question imply any admission on the part of the plaintiff that the giving of the security was a condition. Lastly, the agreement Exhibit II, executed in July 1893 on which reliance is placed on behalf of the appellant, is not in my opinion inconsistent with the view, that there is no condition. Assuming that it is open to refer to that document in construing Exhibit A which was executed in September, the language of the former Exhibit II with reference to the point under consideration is substantially the same as that of the latter Exhibit A.

Though with reference to a question of construction of the terms of a document decisions upon the construction of other documents may not be of binding authority, still I think reference may be made to *Campbell v. Jones* (6 T. R. 570, 3 R. R. 263) the facts of which present some analogy to the facts of this case. Thereby an indenture made between A (a patentee) and B which recited an agreement that in consideration of £500 to be paid by B to A in manner thereinafter mentioned A would instruct B in his method and should also permit B to use his patent, A in consideration of £250 paid by B and of the further sum of £250 to be paid, &c., covenanted that he would with all possible expedition instruct B in his method; and B covenanted that he would on or before the 25th February 1794 or sooner if A should before that time have instructed him, &c., pay the further sum of £250. The Court of King's Bench held that A might sue B for the £250 without averring that he had taught B the method, &c., *Lord Kenyon* C.J. observed with reference to the first ground on which the conclusion of the Court was rested "the intent of the parties appears to be that the payment might be accelerated but should not in any event be delayed." The other ground taken by the Court for their view was that "the teaching of the defendant was not the whole consideration of the covenant to pay." So here the covenant to give security was of course not the whole consideration for the covenant to pay the two thousand rupees if it formed any part of the consideration at all;

for, that sum was the unpaid moiety of the price of the lands sold and delivered to the mortgagor and mortgaged by him for that moiety under the instrument in question. In conclusion it may not be superfluous to add that in cases like this where the parties have not chosen to declare in the instrument that the performance of any particular covenant therein is a condition precedent, as it was open to them to declare, those who construe the instrument, should, in the language of *Bramwell* B. "be chary in doing for them that which they might but have not done for themselves." *Tarrabochia* v. *Hickie*, 1 H. and N. 183 at page 188. For all these reasons, I am of opinion that the execution of a security bond as provided in Exhibit A was not a condition precedent and the suit is sustainable though no such security was given before it was instituted.

However, upon the finding now come to as to the terms of the security bond undertaken to be given by the first respondent, the declaration made in the lower appellate Court's decree that the appellant do accept the security bond, Exhibit B, *must be expunged* since the bond is not in accordance with the provisions of Exhibit A as unaltered. Nor is the first respondent entitled to interest after the 3rd September 1894, he having failed to furnish by that date such a bond, as he was bound to furnish. Therefore, in so far as the appellant is concerned that decree must be modified with reference to the two points mentioned. As to the failure on the first respondent's part to furnish a proper security bond, it is not necessary to determine what damages the appellant is entitled to, since the respondent is willing now to execute it or cause it to be executed and the appellant is willing to take it. The decree will, therefore, provide that he shall do so before an order absolute is passed. The appeal is otherwise disallowed, but the first respondent must pay the appellant's costs throughout. The memorandum of objections is dismissed with costs.

Moore, J.:—On the 20th July 1891 an agreement Exhibit (II) was entered into between the plaintiff and Vydinada Aiyar, the husband (since deceased) of the 1st defendant and his mother Seetai Ammal under which the plaintiff undertook to sell certain lands to Vydinada Aiyar and his mother for Rs. 4,000. Of this sum it was agreed that Rs. 2,000 should be paid to the plaintiff with interest within three years from the date of Exhibit II and it

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Moore, J.

was further stipulated that before the plaintiff received this sum he should furnish security to the extent of Rs. 2,000 and that in case he failed to do so and to receive the money within the term of three years fixed he should whenever he subsequently furnished the security receive the Rs. 2,000 but without interest. It is shown that on the 4th September 1891 the sale deed agreed upon in Exhibit II was executed and that on the same day a deed of mortgage (Exhibit A) was drawn up under which the vendees, Vydinada Aiyar and his mother, mortgaged to the vendor, the plaintiff, the property comprised in the deed of sale. In this latter document stipulations almost identical to those to be found in Exhibit II were inserted and it was agreed that the mortgagors should pay to the mortgagee Rs. 2,000 either on the 3rd September 1894 or before that date or on any other day on which a security deed should be executed either by the mortgagee (plaintiff) himself or by some other person on his behalf and it was further agreed, as in Exhibit II that if within the date fixed the security was not furnished and the sum of Rs. 2,000 paid the plaintiff was to receive the principal on whatever date the security might eventually be furnished but without any interest for the period subsequent to the 3rd September 1894. Later on, after the death of Vydinada Aiyar, his widow (1st defendant) and his mother sold the property to the 2nd defendant. The plaintiff has brought the present suit on Exhibit A alleging in the plaint that he had offered to get a security deed executed as agreed on but that the 2nd defendant had ignored his offer. He therefore sued for the recovery of Rs. 2,000 together with interest from the defendants and by sale of the mortgaged property. The 1st defendant did not contest the suit and the 2nd defendant pleaded that no deed of security drawn up as agreed upon had been tendered to him and that he was ready to pay the amount due by him provided a "proper deed" of indemnity was tendered. He subsequently added a plea that Exhibit A had been altered subsequent to execution and contended that on that ground the suit should be dismissed. The further inquiry that has now been made by the Subordinate Judge under the order of this Court shows clearly that Exhibit A was altered by the plaintiff after the document had been registered. It is therefore clear that that portion of the decree which directs the 2nd defendant to accept Exhibit B, a security bond drawn up according to the terms of Exhibit A as altered by the plaintiff, cannot

stand. I however agree with the learned Officiating Chief Justice that it is open to us to pass a decree directing that on the plaintiff tendering to the 2nd defendant a security bond drawn up in accordance with Exhibit A as it stood before alteration time should be allowed to the 2nd defendant to pay Rs. 2,000 with interest up to the 3rd September 1894 and that on his failure to do so the mortgaged property should be sold. It will be seen that in his first written statement the 2nd defendant expressed his consent to such a decree being passed and that his only objection to the plaintiff's suit was that Exhibit B had not been drawn up in accordance with the terms of Exhibit A. The decree proposed by the Officiating Chief Justice is also in my opinion in accordance with the terms of the agreement entered into, as set forth in Exhibit II taken with Exhibit A, which, as I read them, were that whenever the plaintiff should tender a properly drawn up security bond the mortgagors should be bound to accept it and pay the sum of Rs. 2,000 due subject to the condition that if the security bond was not tendered on or before the 3rd of September 1894 the plaintiff was to lose all interest subsequent to that date. This condition was not in my opinion a condition precedent to the plaintiff's right of action. It will be satisfied if even after the final decree in this suit is passed the plaintiff offers to the 2nd defendant a security bond drawn up as agreed upon.

I would, therefore, modify the decree of the lower appellate Court as proposed by the Officiating Chief Justice.

O'Farrell, J. :—The finding now submitted is to the effect that the alteration was made without the consent of the defendants who executed the mortgage deed, and the learned Vakil for the respondents does not venture to contest the correctness of this finding. Following, therefore, the opinion of the Judges who ordered the remand, the plaintiff's suit should be dismissed. It is for the first time, however, contended in argument by the Vakil for the respondents, that the suit should not be entirely dismissed, but decreed conditionally on the plaintiff now executing a proper guarantee according to the terms of the unaltered agreement. He relies upon *Ramasamy Kon's* case (3 Mad. H. C. R., 247) and the Full Bench decision reported at I. L. R., 9 M., 399. The effect of those decisions, so far as concerns the present case, would seem to be,

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that where a vested interest has been created by the execution of a document, such right will not be affected by any subsequent alteration, and the document may be given in proof of the creation and extent of the right. The remarks of Lord Abinger in *Davidson* v. *Cooper* (11 M. and W., 778) were referred to. But the rider was added that even in such a case the suit must be framed on the transferred right and not on the altered document.

It appears to me plain from the recital of the pleadings contained in the District Munsif's judgment that the suit was based not on the transferred right but upon the altered document. In that view the cases cited are against the respondent's contention. I think, moreover, that these cases are inapplicable for another reason, *viz.*, that no obligation has as yet attached under the unaltered document. The defendants' liability to pay the balance of the purchase money is contingent upon the prior execution by the plaintiff of a general guarantee and he, relying on the fraudulent alteration, has tendered only a limited one which the defendants have naturally refused to accept. I quite concede, that where an agreement has, as to one of the parties, been wholly executed, it is deducible from the Madras cases, that the altered contract may be given in evidence of the correlative obligations incurred by the other party. But here the agreement so far as relates to the payment of the balance of the purchase money is executory, and contingent upon the fulfilment by the plaintiff of the prior obligation to execute a proper guarantee. I think this is plain from the language of the document sued upon—though that is somewhat involved. "If within the fixed date the security be not furnished, you shall receive the principal sum without interest for the period subsequent to that on the day on which the security is furnished." I think it appears, however, still more clearly from the stipulation in the agreement for sale (Exhibit II). A term of three years is there fixed and the principal is made payable on or before the expiry of that term with interest at the rate of 6 per cent. per annum. The document then goes on to say "*Before I receive* the principal sum, security shall be given of immoveable property. . . . If within the said three years I fail to do so, I shall, at the time when I furnish security subsequent to the said stipulated time, receive the said sum of Rs. 2,000 without charging interest up to that time." It seems to me that nothing could be clearer than this,

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and it was evidently understood as creating a condition precedent by the plaintiff himself when he framed his plaint and stated that "*to entitle the plaintiff to take payment* of the amount.. ...the vendees should *beforehand* be furnished with an indemnity bond"; and he accordingly had such a bond drawn up and presented along with the plaint. I may further point out that the District Munsif certainly understood the condition as to the furnishing of security as a condition precedent, for he distinctly says so in paragraph 7 and again in paragraph 11 of his judgment, and the plaintiff never contested that view in his grounds of appeal or even in special appeal. He has not taken the ground he now seeks to press upon us even in the memorandum of objections to the finding of the Subordinate Judge. It was put forward for the first time in argument when he was unable to sustain the objections to the finding of fact and even then I understood him to ask not for an unconditional decree, but for a decree conditional upon his executing a proper security bond in accordance with the unaltered instrument. I am unable to see how he can get any such decree in the present suit, except, perhaps, by consent. It is urged that if the plaintiff's suit is wholly dismissed he will be driven to fresh litigation. I do not think this necessarily follows, as the defendants—quite honestly so far as I can judge—have always professed themselves ready and willing to pay the money if a proper guarantee be executed. But even if this consequence did follow, I do not think it ought to affect our judgment. We are not specially concerned to make the paths of forgery easy or relieve the plaintiff from the consequences of his criminal folly. I would, therefore, as originally contemplated by the late learned *Chief Justice* and Mr. Justice *Benson*, allow this second appeal and dismiss the plaintiff's suit with costs throughout. I think also that the documents sued upon should be impounded and forwarded, with other material papers, to the District Magistrate of Tanjore in order that he may consider the propriety of directing criminal proceedings.

Kizhakedath Unniram v. The Queen.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Moore and Mr. Justice O'Farrell.

Kizhakedath Unniram and others.. .. Appellants* (*Prisoners*).

vs.

The Queen .. .. .. Respondent.

Practice—Charge to the Jury—Misdirection.

The duty of a Judge in charging the Jury is to put the facts before them in a simple and natural manner and not to suggest far-fetched and improbable explanations as being possible explanations of facts.

Appeal from the sentences of the Court of Sessions of the South Malabar Division in Case No. 32 of 1899.

The appellants were not represented.

N. Subrahmanyam for *C. Sankaran, Acting Public Prosecutor,* for the Crown.

The Court delivered the following

JUDGMENT:—The accused were charged with dacoity (which the Sessions Judge inaccurately terms *piracy*, an offence committed only on the High Seas) and the jury must be held to have acquitted them of that offence, since they have convicted them of dishonestly receiving stolen property under S. 411, Indian Penal Code. We think that the manner in which the Sessions Judge charged the jury was calculated greatly to prejudice the accused, and in some points amounted to clear misdirection. We allude to the attempts made by him to suggest far-fetched explanations of the points that told in favour of the accused. We have no doubt that these suggestions were prompted by the Judge's desire to be impartial. But we would observe that the duty of a Judge charging a jury is to present the facts in their natural aspect; and if that aspect is greatly favourable to the one side or the other any attempt to redress the balance by out-of-the-way suggestions not put forward by the parties, is not to be impartial but the reverse. Such suggestions may properly be urged by the pleaders, and the jury will then give them their true weight; whereas if they are put forward by the Judge, a value will be attached to them to which they are not intrinsically entitled.

* Criminal Appeal, No. 494 of 1899. 17th October 1899.

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One of the most important of such suggestions of the Judge to which we would refer is his view that the complainant was justified in sailing straight to Mangalore without reporting the offence, because the rules of the Custom House required it. That was plainly an untenable suggestion. It was the duty of the *Tindal* to report the offence at the earliest opportunity, and he should have put in at the nearest Port or Custom House to do so.

The neglect to give the earliest information possible is a most serious matter, leading to a strong suspicion (which many other circumstances not alluded to by the Sessions Judge tend to confirm) that this was no dacoity at all, but that a certain portion of the cargo was either smuggled ashore to avoid the Custom House regulations, or that the crew were in league with the persons who removed the cargo.

The suggestion on the part of the Judge that the complainant and his party were bound to go straight to their ultimate destination without stopping to report the robbery, was a clear misdirection and must have greatly prejudiced the accused persons.

The suggestions of the Sessions Judge to explain the complainant's total misdescription of the box claimed by him, and to reconcile his contradictory statements about the rings as well as his far-fetched explanation for the rings not fitting the complainant's fingures, all appear to us, though in a minor degree to be of the same objectionable character.

We would also observe that the Judge should have pointed out to the jury the extreme improbability that a crew of seven men, having the advantage of their position on board a vessel of some size, would have allowed 14 men in canoes to board and overpower them without a struggle. He should also have noted that though they professed to have shown their wounds to the Port Officer at Mangalore, there is no evidence that they did so: that only two of the crew have been examined as to this extraordinary story: that there is some doubt, on the complainant's evidence, whether they complained *at once* to the Port Officer or only after the Custom House Officials had discovered the shortage in the cargo: and that while in their first version they said the offence took place in the limits of the port of Chowghat, they now place the scene of the

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offence at Kurikuzhi which—as we learn from the preliminary register—is about 20 miles south of Chowghat. It also requires explanation why the complainant who had ample time before reaching Mangalore to see what was actually stolen, omitted so many articles in his complaint to the Custom House authorities. If it is said that some of these were—as is undoubtedly the case—of trifling value, why should the thieves have troubled themselves to take them? Again how did the Police authorities manage to obtain within a few days the information which led to the search of the houses of accused 1 to 3 and why did they sieze and retain properties as to which they had at the time no complaint that they had been stolen.

We think the charge to the jury was extremely defective in not pointing out and discussing matters of this description, and that in reference to the explanations we have noted of suspicious circumstances the Judge entirely misdirected the jury to the prejudice of the prisoners.

We, therefore, set aside the finding of the jury and as we think the evidence both as to the commission of the actual offence and the complicity of the appellants, is of the most worthless description, we do not think we should order a retrial.

We accordingly reverse the convictions and sentences and direct that the appellants be set at liberty.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. C. A. White Chief Justice, and Mr. Justice Benson.

Thiruvengada Naicker ... ...Appellant (*Petitioner*).*

v.

Mahomed Saliah Sahib ... ...(Defendant).

Limitation—Letters of Administration—Delay.

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There is no period of limitation prescribed for an application for Letters of Administration. *Gnanamuthu Upadesi* v. *Vana Koilpillai Nadan*, I. L. R., 17 M., 379 followed.

The executor, under the will of one M., dated December 1875, died in June 1885 without having completely administered the estate of the deceased. M.'s son, the residuary legatee, took possession of the estate and subsequently sold a house to one M. S. S. At the request of this M. S. S. and in order to confer on him a valid title to

* O. S. Appeal 21 of 1899. 25th October 1899.

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the house, M.'s son applied to the High Court for Letters of Administration limited to the part of the estate left unadministered by the executor. This application was made on the 21st October 1898:

Held that the applicant was entitled to the letters limited to the unadministered part of the estate and that there being no period prescribed by the Statute of Limitations for an application of the kind, the delay of 13 years did not disentitle him to the grant of Letters of Administration as prayed for, especially as the object seemed to be merely to confer a valid title upon the vendee.

Appeal from the Order of the High Court of Judicature in the exercise of its ordinary Original Civil Jurisdiction, dated 25th October 1898, in Testamentary Petition No. 141 of 1898.

This was an application for Letters of Administration to the estate of one Maharajavalli Ammal, the petitioner's mother, who died in or about June 1876—that portion of the estate which was left unadministered by the executor under her will, dated 22nd December 1875. The executor died on the 29th June 1885 without having taken out probate or making any provision for the further administration of the estate. The petitioner, who was the residuary legatee under the will, took possession of a house in Chintadripet and some other properties left unadministered by the executor and subsequently on the 13th August 1892 sold the house to one Mahomed Saliah Sahib. This Mahomed Sahib now wished to sell the house to a third person who was unwilling to take it without Letters of Administration being previously obtained by the petitioner. Hence this application by the petitioner, dated 21st October 1898.

Boddam, J., dismissed the application as too late. His endorsement on the petition ran thus:—"This is too stale. Order refused." The petitioner appealed against this order on the grounds that there was no period of limitation prescribed for an application for Letters of Administration and that in the circumstances of the case which clearly showed that the Letters were asked for merely to confer a valid title upon the vendee, the application should not have been refused.

R. F. Grant instructed by *T. S. Thyagaraja Aiyar* for appellant.

This appeal coming on for hearing, the Court delivered the following

JUDGMENT:—The learned Judge appears to have declined

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to grant the application on the ground of the delay which has taken place between the death of the executor which occurred in June 1885 and the date of the application for Letters of Administration.

There is no statutory limitation as to the time within which an application for a grant of letters of administration must be made. See the case reported in *Ganamuthu Upadesi v. Vana Koilpillai Nadan,* I. L. R., 17 M., 379. The object of obtaining a grant in the present case is to perfect the title of the petitioner's vendee to a house which formed part of the assets of the estate.

We think the petitioner is entitled to a grant limited to the property unadministered by the executor and we accordingly set aside the order of the learned Judge and remand the case to the Registrar for disposal.

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